(1) Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 2001

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether section 144 of the 1996 Farm Bill creates an unmistakably clear "blanket" exemption to the dormant Commerce Clause for California's interstate regulation of the dairy industry, which would be otherwise limited by this Court's holding in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and its progeny?

II. Whether it is proper for courts to resort to legislative history or a paraphrase of a statute in order to discern an "unmistakably clear" Congressional exemption to the negative Commerce Clause?

LIST OF PARTIES

The Petitioners are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms (hereafter Petitioners). The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food & Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food & Agriculture (hereinafter "CDFA")

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners have issued stock or securities that are publicly traded, and none of the Petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities.

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HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,
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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 9, 2001.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 259 F.3d 1148 and is reprinted in the Appendix to this Petition at A-1.[1] The Order of the U.S.

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[1] Citations to material printed in the Appendices appear herein as "A-__."

Court of Appeals for the Ninth Circuit denying Petitioners' request for rehearing and rehearing *en banc* is unreported and is reprinted at A-59. The Opinion and Order of the U.S. District Court for the Eastern District of California granting summary judgment in favor of the Respondents and denying Petitioners' Motion for Summary Judgment is unreported and is reprinted at A-16.

JURISDICTION

Petitioners seek review of the ruling of the United States Court of Appeals for the Ninth Circuit, dated August 9, 2001, affirming the Order issued by the United States District Court of the Eastern District of California, granting California's motion for summary judgment and dismissing Petitioners' complaint. The Ninth Circuit held that section 144 of the 1996 Farm Bill (Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 914-930 (1996) (codified as amended in scattered sections of 7 U.S.C.)) immunized each of California's separately administered milk regulation programs from the dormant Commerce Clause. On August 23, 2001, Petitioners requested rehearing and rehearing *en banc* from the U.S. Court of Appeals for the Ninth Circuit. By Order dated September 24, 2001, the court denied this request. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Petitioners file this request for certiorari within the time allotted in accordance with Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Excerpts of the following provisions are reprinted in the Appendix at A-61, A-62, and A-79, respectively: U.S.

Constitution Article I, Section 8; Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§141-152, 110 Stat. 914-930 (1996); and Milk Pooling Branch, California Department of Food and Agriculture, *Pooling Plan for Market Milk, As Amended*, (Jul. 1, 1997).

STATEMENT OF THE CASE

I. THE PETITIONERS' BUSINESS

The Petitioners, Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms, are family-run dairy farms located in northern Nevada. They belong to a dairy farmer cooperative known as Dairy Farmers of America that markets their raw milk to milk processors located in Nevada and California. Hillside Dairy and Milky Way Farms have shipped a portion of their raw milk into California since the 1960s although Milky Way Farms stopped milking cows after the 1997 pooling amendments). A&A Dairy has been shipping into California since the mid-1970s while L&S Dairy has been doing so since its establishment in 1993.

II. FEDERAL REGULATION OF THE DAIRY INDUSTRY AND THE CALIFORNIA MILK REGULATORY SYSTEM

(a) Federal Regulation of the Dairy Industry

The dairy industry has been substantially regulated since the early 1900s because of the importance of dairy products to the public health and welfare. Initially, regulations emanated from states and were sanitary, health, and minimum price regulations. But in 1935, as milk began to move more in interstate commerce, this Court held that the Commerce Clause prohibited states from setting minimum prices for milk purchased in other states for importation.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). Congress subsequently authorized the U.S. Secretary of Agriculture ("Secretary") to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce." Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, § 296, 50 Stat. 246-249 (1937) (codified in scattered sections of 7 U.S.C.) ("AMAA").

The AMAA authorized the Secretary to implement price controls prohibited to states by *Baldwin*. Under the AMAA, the Secretary is authorized, *inter alia*, to regulate minimum prices paid to dairy farmers for their milk by issuing marketing orders for multi-state geographic regions of the country ("Federal Orders"). 7 C.F.R. §§ 1000-1135 (2001). Federal Orders also provide a mechanism for combining and sharing the minimum price revenue (known as pooling). *See* 7 U.S.C. § 608c(18) (1999).

For purposes of establishing minimum prices, USDA has classified milk according to the use processors make of the raw milk ("Classified Pricing"). There are essentially four classes of milk, each of which sells for a different minimum price set by USDA formulae. Milk having the same quality and composition will be priced differently depending on whether it is Class I and used for fluid milk, Class II and used for ice cream, Class III and used for cheese, or Class IV and used for butter or powder. Generally, Class I milk sells for the highest regulated price, and class III or IV for the lowest regulated price.

Processor payments are tracked through a producer settlement fund, commonly referred to as the pool. For example, a plant that uses 50% of its milk to make cheese and 50% to make butter is required to account to the pool at the Class III price on 50% of the milk and the Class IV price on the other 50%. The revenue generated by classified prices is accounted for by the market administrator in a pool and then

is divided among dairy farmers evenly, with some slight differences. The price the dairy farmer receives after pooling is known as the "blend price." California Dep't of Food & Agric., *DMB-SP-104, California and Federal Milk Marketing Orders – A Comparison* [hereinafter "*Comparison*"], at 5.

In addition to the Federal Order system, the U.S. taxpayer subsidizes dairy farmer prices through the federal support price program. 7 U.S.C. § 7251 (1999 & 2001 Supp.). This program ensures that minimum classified prices do not fall below a predetermined level by making government purchases of manufactured dairy products such as nonfat dry milk, cheddar cheese and butter. Since these finished product prices are used to determine minimum raw milk prices, the government can support minimum raw milk prices.

Although states may opt out of the Federal Order program, most joined, finding it difficult to administer a meaningful state program under negative Commerce Clause decisions, including *Baldwin* and progeny. California is one of the few states that has remained outside of the Federal Order program with a substantial regulatory program that, in many ways, emulates the Federal Order program.

(b) The California Milk Regulatory System

For the last 94 years, California's dairy industry has been regulated by the State. Three different branches of the California Department of Food and Agriculture ("CDFA") administer three major programs: (1) the Milk and Dairy Foods Control Branch enforces state compositional standards, labeling and health and safety requirements; (2) the Dairy Marketing Branch administers the Stabilization Plan through which minimum prices are established; and (3) the Milk Pooling Branch administers a Pooling Plan through which revenue from the sale of raw milk is pooled and distributed

among California dairy farmers according to each farmer's pre-determined entitlement.

(i) Minimum Compositional Standards

California has enforced minimum compositional standards ("nutritional standards") on a state-wide basis since at least 1907. *In re Hoffman*, 99 P. 517, 518 (Cal. 1909). Milk as produced by a healthy cow typically contains approximately 3.7% butterfat, 8.7% solids-not-fat, and 87.6% fluid carrier (*i.e.*, water). As early as 1907, the California legislature established minimum levels of butterfat and solids-not-fat for fluid milk sold to consumers in packaged form inside California. Presently, in connection with milk processed for beverage consumption, California imposes minimum compositional standards for solids-not-fat that exceed those established by the United States Food and Drug Administration. *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1178 (9th Cir. 1998).

(ii) Minimum Prices Administered Through The Stabilization Plan

In 1935, the California legislature authorized CDFA to establish minimum prices to be paid by processors to dairy farmers for raw milk. California Dep't of Food and Agric., *DMB-SP-102, History of the California Milk Pooling Program* [hereinafter "*History*"], at 1. Minimum raw milk prices are derived from economic formulae that have been modified over the years, and which vary according to the finished product for which the raw milk is purchased.

Just as with the Federal Order system, this system is known as classified pricing. There are five, instead of four, classes of milk in California (Class 1, 2, 3, 4a and 4b), and each class is assigned a different minimum price. As in the

Federal Order system, the highest minimum price generally (but not always) applies to Class 1 (fluid) milk. The lowest minimum prices are generally in Class 4a or 4b (milk used to produce butter, powder or cheese). Prior to the implementation of a pooling system in 1969, processors satisfied their minimum price obligation by accounting directly to the individual dairy farmer. Since the adoption of a pooling system, processors satisfy the minimum price obligation by accounting to the pool.

The Milk Stabilization Plan provides processors with various allowances and credits (or discounts). One such discount is the fortification allowance, which has been in the Plan since 1961. The fortification allowance provides processors with a discounted minimum price to compensate them in the event they must incur the added expense of fortifying milk with condensed or dry milk to comply with state compositional standards. CA Dep't of Food & Agric., *Stabilization and Marketing Plan, As Amended, For Market Milk For N. And S. California Marketing Areas* (Apr. 1, 1997) [hereinafter "*Stabilization Plan*"], at § 300.3.

(iii) Revenue Sharing By Farmers Administered Through The Pooling Plan

California's pooling system has been in operation since July 1, 1969. Pooling regulations are codified in the Pooling Plan. (A-79). Under the Pooling Plan, CDFA combines all dairy farmer income from raw milk sales at classified prices and then distributes the total amount in the pool among California's dairy farmers at one of two levels (quota or overbase), regardless of how their milk was used. This system makes dairy farmers indifferent as among potential end-users. Indeed, pooling was adopted in order to insulate California dairy farmers from competition for sales to fluid milk processors, which generally paid the highest of the

classified minimum prices. With pooling, all California dairy farmers enjoy a portion of the Class 1 market.

Instead of distributing pool revenue on a pro rata basis, as in the Federal Order system, in California the revenue is distributed through a quota system, which accrues to the exclusive benefit of California dairy farmers. Quota was initially distributed, without cost, to California dairy farmers based on their existing share of the Class 1 market in the late 1960s. Quota represents the daily pounds of milk that entitle a California dairy farmer to a higher pool price. The remainder of the California dairy farmer's daily production is designated as overbase. As a result of pooling in California, California dairy farmer income is no longer dependent on the individual processor's plant usage. Instead, it depends on the total revenue generated on sales of raw milk by California dairy farmers in the aggregate at minimum classified prices, and each dairy farmer's quota ownership.

Adoption of the Pooling Plan did not change the total minimum price obligation imposed on California processors pursuant to the Stabilization Plan. Through the Pooling Plan, California processors were required to assist in milk revenue distribution by making part payment of their total minimum price obligation to the dairy farmer and part payment to the pool for blending and redistribution.

Until July 1,1997, California's Pooling Plan did not burden or benefit out-of-state dairy farmers. California processors could make payment directly to out-of-state dairy farmers, and did not have to pay a portion of the processors' minimum classified price obligation to the pool for blending and redistribution among California's dairy farmers.

(iv) The Challenged Pooling Amendments

In 1997, however, under pressure from members of the California dairy industry to deal with the out-of-state milk

problem, CDFA undertook to amend the Pooling Plan, for the first time, to pool out-of-state milk as well. As of July 1, 1997, CDFA required processors to satisfy their minimum price obligation on out-of-state milk by paying part to the pool, and part to the out-of-state dairy farmer. (A-89 at § 900(d)). Out-of-state dairy farmers were, without their consent, forced to share a portion of their revenue with California dairy farmers. This forced sharing of out-of-state farmer revenue is effectuated through the establishment of a pool obligation, and a corresponding, albeit reduced, credit for processors purchasing out-of-state raw milk. Out-of-state dairy farmers continue to be barred from enjoying the benefits of quota ownership, including the benefit of not having to incur transaction costs searching for the highest use buyer for their milk on a month-to-month basis. CDFA now assigns the out-of-state milk a credit that by its design restricts the out-of-state dairy farmer from ever attaining (or exceeding) the status of the best treated California dairy farmer. More to the point, the imposition of a pooling obligation on out-of-state milk has resulted in a dollar-for-dollar reduction in the price received by out-of-state dairy farmers on their California raw milk sales.

III. THE PROCEEDINGS BELOW

On June 25, 1997, Petitioners brought suit against Respondents in District Court seeking injunctive and declaratory relief, arguing that the 1997 amendments to the Pooling Plan violated the dormant Commerce Clause because they illegally discriminated against out-of-state raw milk producers. By Order dated July 21, 1999, the District Court granted summary judgment in favor of CDFA. The court did not reach the merits of the Commerce Clause claim, but instead relied on the holding in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525

U.S. 1105 (1999). In *Shamrock*, the Ninth Circuit concluded that section 144 of the 1996 Farm Bill immunized, *inter alia*, California's pooling laws from scrutiny under the Commerce Clause for purposes of enforcing its fluid milk standards with respect to packaged milk sold in California. *Id.* at 1182.

In reaching its conclusion, the *Shamrock* court oversimplified the California milk program, which consists of the three distinct parts discussed above at II(b): (1) nutritional standards; (2) minimum prices; and (3) pooling requirements Section 144 of the Farm Bill applies only to the first part of this program, nutritional standards. It is simply not relevant to the pooling requirements at issue in this case. These parties do not contest the correctness of the *result* in *Shamrock* precisely because section 144 was adopted for the purpose of permitting California to enforce its fluid milk standards against entities like Shamrock. Nonetheless, the District Court failed to analyze the scope and applicability of the *Shamrock* decision, and held that it was compelled to follow precedent without regard to the impact on these parties or others.

The Court of Appeals in the decision below applied the same faulty analysis and did not reach the merits. The court stated that it was unable to overturn the holding of another panel of the same court and relied exclusively on *Shamrock*, even though no pooling provisions were involved in *Shamrock*. Without serious analysis, California has unexpectedly gained a huge windfall and advantage in the never-ending saga of domestic milk protection that has so often required this Court to limit and resolve.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals warrants review by this Court for two compelling reasons. First the issue raised by this case -- whether California, alone

among the 50 states, may, without an unmistakably clear exemption from Congress, implement protectionist laws in the dairy industry that adversely affect interstate commerce -- is an issue of national significance that is likely to recur and that merits consideration by this Court in its own right. Second, the Ninth Circuit Court of Appeals' resolution of this issue is in clear conflict with prior decisions of this Court, and if left undisturbed, would undermine the constitutional restraints delineated by this Court regarding state power to regulate interstate commerce.

I. THE OPINION BELOW RAISES CRITICALLY IMPORTANT ISSUES AFFECTING THE NATION'S DAIRY INDUSTRY, THE FEDERAL MILK PROGRAMS, AND THE U.S. TAXPAYER THAT IF NOT REVERSED THREATENS 66 YEARS OF THIS COURT'S INTERSTATE COMMERCE AND JUDICIAL RESTRAINT JURISPRUDENCE AND NATIONAL DAIRY POLICY

Once again, and for at least the ninth time in the past 66 years, this Court is presented with the recurring issue of whether a state may protect its local dairy industry from out-of-state competition notwithstanding the dormant Commerce Clause. This time, with a twist, the Respondents rely upon a misplaced claim that section 144 of the 1996 Farm Bill exempts California from any Commerce Clause scrutiny. The court below erroneously gave the Commerce Clause challenges short shrift by holding, without serious analysis, that all three of California's separately administered milk programs were immunized from any Commerce Clause scrutiny. This result must be taken seriously as it threatens to impose costs and burdens that reach far beyond the interests of these Petitioners.

The immunity granted to California by the Ninth Circuit's judicial activism -- not by a clear expression from Congress

threatens the vitality of the dairy industry in states that surround California as noted in the *amicus curiae* brief filed below by the Nevada Attorney General and the Nevada Milk Commission. The significant injury to Nevada's dairy farmers is on record. Since the 1997 amendments challenged herein forced Nevada dairy farmers to contribute to the California pool, Nevada dairy farmers have seen their income on sales into California reduced dollar for dollar by the amount added to the California pool. Nevada's dairy farmers are not the only Nevadans injured. To the extent that California's discriminatory treatment causes Nevada dairy farmers to exit the business, Nevada's milk processing plants and thus Nevada consumers will be adversely affected by the loss of a fresh local supply of raw milk.

The decision below also issues California a license to undertake whatever protectionist measures it or its local dairy industry sees fit. The blanket exemption granted by the Ninth Circuit in its judicial gloss to section 144 of the 1996 Farm Bill would create the unique situation that California can regulate sales of milk from out-of-state without regard to the impact on Federal Orders. This case, in providing that opportunity, overwhelms 64 years of federal milk order rules and this Court's decisions for the past 66 years, and cannot have been Congress' intention when enacting section 144.

Indeed, an examination of Title I, Subtitle D, Chapter 1 of the 1996 Farm Bill (A-62) reveals a complex and complicated interplay of federal taxpayer support, federal order reform, California Fluid Milk Standards and California make allowance issues. Taken together the California and federal system interact to create both regulated milk prices and a minimum price safety. The Ninth Circuit's failure to remain faithful to the Commerce Clause and to construe an alleged statutory exemption very narrowly, upsets the careful balance set by Congress in the 1996 Farm Bill and predecessor legislative efforts.

Permitting California, the state with the largest milk production in the nation, to go its own way has the potential for a significant impact on the future course of both federal programs. To the extent the national supply of manufactured dairy products such as butter, cheese and nonfat dry milk increases, prices for these products tend to fall. Very low prices require purchases of these products by the government through the taxpayer-funded price support program. In addition, these prices also factor into the formulae for and drive the minimum regulated prices for the different classes of raw milk under the federal order system.

California, with the largest combined share of the nation's butter, powder and cheddar cheese production, can, with changes in production of these products, directly impact both federal programs. With a judicially-granted blanket Commerce Clause exemption, California can further insulate its fluid milk industry in order to subsidize its cheese industry through elevated prices for beverage milk. This will put downward pressure on Federal Order prices and require additional Price Support purchases. In turn, this will cause injury to the taxpayer and farmers from states across the country as well as their local economies.

It would be unwise to allow such an aberrant application of statutory construction to override 66 years of strict adherence to the Commerce Clause in connection with the dairy industry, particularly in light of the bald economic protectionism by California. In the seminal case of *Baldwin v. Seelig*, New York attempted to protect its own dairy farmers from more efficient competition from Vermont. 294 U.S. 511 (1935). In order to ensure that its dairy farmers received a favorable price for their milk, New York established a single minimum price which New York milk processors were required to pay when purchasing milk from New York farms. New York's power to enact that measure was not questioned. However, the New York regulation also

prohibited in-state processors from reselling in New York milk purchased from out-of-state at a price less than the minimum price established for New York milk. *Id.* at 519.

This Court unanimously struck down the New York measure under the Commerce Clause holding that a state may not prohibit the farmers of another state from engaging in interstate commerce merely because they may be more efficient. *Id.* at 522. In response to New York's stated justification for the price measure (*i.e.*, that it will tend to impose a higher standard of quality and purity of the out-of-state milk), the Court explained: "*commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another*, in the faith that augmentation of prices will lift up the level of economic welfare...." *Id.* at 524 (citations omitted) (emphasis added).

More recently in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), this Court struck down a Massachusetts pricing order that required payment into a pool by all farmers including out-of-state farmers, but distributed that money as a subsidy to in-state farmers only. In that case, this Court explained that "[t]he pricing order thus violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" 512 U.S. at 199.

The California Stabilization and Pooling Plans at issue in this case burden interstate commerce as plainly as did the programs in *Baldwin* and progeny. Not only are the prices charged by out-of-state farmers fixed by the Stabilization Plan, but the in-state farmers also receive an improper subsidy from the out-of-state farmers through the 1997 Pooling amendments.[2] (A-89).

[2] The Petitioners have argued at length in the proceedings below that the regulatory scheme adopted by CDFA in 1997 for the first time forced Nevada dairy farmers to share their milk proceeds with California farmers through California's pool. However, Nevada farmers are at best second class members of that pool and CDFA's new system discriminates against them. The issue of this discrimination is not properly before this Court precisely because the Ninth Circuit's decisions in *Shamrock* and the case below (as applied to raw milk) cut off any contrary legal argument, regardless of the legal theory or factual outcome.

Moreover, the incentive system built into the Pooling Plan through differential credits for out-of-state milk will encourage California processors to purchase Class I milk from California dairy farmers to the exclusion of out-of-state dairy farmers. Effects of this type consistently have been held unconstitutional by this Court. *See Polar Ice Cream v. Andrews*, 375 U.S. 361 (1964) (overturning a Florida statute that required milk dealers in the Pensacola milk marketing area to allocate a portion of their monthly sales in various classes of milk to certain Pensacola dairy farmers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576 (1997) (invalidating tax exemption because "[a]s a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market"); *West Lynn*, 512 U.S. at 192 (striking down a mirror-image Massachusetts pricing order which taxed in-state milk dealers on all milk purchased from in-state and out-of-state dairy farmers and distributed the proceeds exclusively to in-state dairy farmers); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, (1949) (invalidating the refusal of a New York official to issue a license to a milk dealer which would limit the dealer's ability to purchase in-state milk where the reason for the refusal was fear that the milk would be exported from New York).

Prior to the decision below, CDFA at least claimed to promulgate regulations that stayed within the boundaries of the dormant Commerce Clause. However, the issuance of the challenged regulations and the long history of states adopting protectionist regulation for their dairy industries suggests that no one can count on such restraint in the future. Indeed, this

Court and numerous lower courts have been repeatedly asked to limit these protectionist impulses and establish constitutional boundaries for states seeking to protect local dairy industries. As this Court itself has noted: "A surprisingly large number of our Commerce Clause cases arose out of attempts to protect local dairy farmers." *West Lynn*, 512 U.S at 206 n.22 (1994) (citing eight of this Court's decisions).

Since the result of the decision below will reach well beyond these Petitioners and will undermine the overriding policy articulated by this nation's Founding Fathers in favor of the free-flow of commerce among states as well of the national dairy policy, this Court should review the Ninth Circuit's irreverent treatment of the Commerce Clause as discussed below.

II. THE DECISION BELOW UNDERMINES ESSENTIAL CONSTITUTIONAL RESTRAINTS ON JUDICIAL INTERPRETATION OF STATUTES, PARTICULARLY COMMERCE CLAUSE EXEMPTIONS, AND WILL ALLOW STATES TO BURDEN INTERSTATE COMMERCE MORE FREELY

The importance of the dormant Commerce Clause has logically led this Court to conclude that an exemption from Commerce Clause scrutiny must be "unmistakably clear." *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (plurality opinion); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). The court below simply disregarded this high standard, not only in misconstruing and paraphrasing the plain language of the statute, but also in resorting to partial legislative history. The "unmistakably clear" standard loses any meaning if the decision is permitted to stand. Courts will be permitted, at least in the Ninth Circuit, to find congressional intent

however and whenever they choose to do so in order to justify the result sought.

A. The decision below would establish a new meaning of "unmistakably clear."

Congress must state its intent in "unmistakably clear" language before a court can properly conclude that a state regulation is immunized from Commerce Clause review. *South-Central Timber*, 467 U.S. at 92; *United Egg Producers v. Dep't of Agric.*, 77 F.3d 567, 570 (1st Cir. 1996). The Supreme Court has explained that "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *See South-Central Timber*, 467 U.S. at 92.

Absent clear proof of congressional intent to provide an exemption, a court cannot find a state program to be outside Commerce Clause review, and should not infer this intent from the legislative history or otherwise speculate as to Congress' purpose:

> [W]hen Congress had not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, . . . we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'

New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982) (*quoting Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946)). The state also bears the burden of proof and must specifically demonstrate Congress' intent. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) (Oklahoma had the burden of showing that the Federal Power Act specifically immunized state market restrictions from negative commerce clause scrutiny).

This Court reaffirmed this requirement in *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Maine relied on the 1981 Amendments to the Lacey Act to shield a state law prohibiting the importation of live baitfish from Commerce Clause review. This Court disagreed. Although it is true that the 1981 Amendments provided for federal enforcement of state wildlife laws, there was "nothing in the text or legislative history of the Amendments that suggests that Congress wished to validate state laws that would be unconstitutional without federal approval." 477 U.S. at 139. This Court concluded:

> An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or less direct form of a reduction in the level of scrutiny. Absent 'a clear expression of approval by Congress,' any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.'

Id. at 139 (*quoting South-Central Timber*, 467 U.S. at 92).

Inexplicably, in the decision below, the *Ponderosa* court ignored this well-settled law. The court found that section 144 of the Farm Bill provided an exemption to the California Pooling Plan, including the challenged 1997 amendments, despite the fact that this Plan is not mentioned in the statute and the statute provides no clear indication of congressional intent regarding the Pooling Plan requirements.

The court below did not conduct an independent analysis of section 144. Instead, the court simply relied on *Shamrock*

to hold that section 144's "any other provision of law" and "indirectly or directly" language was intended to create a blanket exemption for California's "pricing and pooling" laws. (A-7 & A-8). Further, the court adopted *Shamrock's* conclusion that California's "pricing and pooling" laws and the compositional requirements were "interrelated and mutually interdependent." (A-7). The *Ponderosa* court followed this language despite the fact that (1) compositional standards refer to processed milk, while the pooling laws govern raw milk; (2) the two sets of regulations are administered independently by different branches of CDFA; and significantly, (3) no pooling provisions were before or analyzed by the *Shamrock* court.

This conclusion misapprehends the "unmistakably clear" standard. This Court's precedent requires courts discerning Commerce Clause exemptions to conduct an exacting inquiry focusing on the specific intent of the statute. The Ninth Circuit substantially broadened this standard, by allowing an exemption for a program that was clearly not covered by section 144, but was only related in some way to its subject matter. (A-8).

The error of this analysis is highlighted by this Court's handling of *Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985) and *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), which involved challenges to the Federal Reserve Board of Governor's (hereafter "Federal Reserve") treatment of applications to expand banking and banking-related activities into states other than the applicants' principal places of business. The Federal Reserve relied on section 3(d) of the Bank Holding Act in both cases. This section of the Act made approval of certain banking transactions contingent on the requirements of state law. *Lewis*, 447 U.S. at 46, n. 11; *Northeast Bancorp*, 472 U.S. at 163.

In both cases there were allegations that the state laws involved were illegal under the dormant Commerce Clause. In *Lewis*, 447 U.S. at 46, Florida defended the validity of its laws, and in *Northeast Bancorp*, 472 U.S. at 167, the Federal Reserve defended the validity of the state laws at issue. In sum, each defended arguing that section 3(d) of the Bank Holding Act immunized the state statutes from Commerce Clause review. *Id.*

In *Northeast Bancorp*, this Court was satisfied that the banking activity being regulated by the State was within the scope of section 3(d) and went on to determine that section 3(d) thus provided the state statute with immunity. 472 U.S. at 174. In *Lewis*, however, this Court determined that the non-banking activity being regulated by the Florida statute was not within the scope of section 3(d) so that any immunity granted would not apply to the Florida statute anyway. 447 U.S. at 47.

Significantly, the decisions turned on the specific facts of the cases. In *Northeast Bancorp*, the applicants sought to acquire banks or bank holding companies in Connecticut and Massachusetts. In *Lewis*, the applicant sought to create an investment management company in Florida. Although the investment management business was closely related to banking, it was not the specific type of operation covered by the language of section 3(d). *Id.* at 47. Thus, according to this Court, it was improper to extend the reach of section 3(d) and any potential Commerce Clause immunity to the Florida statute, which merely regulated a subject matter that was "related" to the subject matter governed by section 3(d). *Id.*

> [t]he structure of the Act reveals that § 3(d) applies only to holding company acquisitions of banks. Nonbanking activities [such as those at issue here] are regulated separately in § 4, which does not contain a parallel provision. Even if § 3(d) could be interpreted

> to authorize additional state regulation, ordinary canons of interpretation thus would lead to the inference that restraints so authorized could apply only to a holding company's banking activities.

Id. Significantly, this Court did not adopt the argument that the nonbanking activities at issue in *Lewis* were "closely related" to the banking activities addressed in section 3(d). This Court acknowledged the importance of statutory context, suggesting that Congress could not have intended section 3(d) to cover the related nonbanking activity at issue in *Lewis* since Congress directly addressed that activity in another section of the statute, albeit without parallel language. *Id.* Thus, in *Lewis* this Court held that section 3(d)'s exemption should not be extended to immunize the Florida statute governing investment management companies from the dormant Commerce Clause. *Id.* at 47.

The decision below is inconsistent with the exacting scrutiny applied by this Court in *Lewis* and *Northeast Bancorp*, and if left undisturbed, would significantly relax the precedent governing the judiciary in discerning Commerce Clause immunity. Section 144 provides no unambiguous indication of congressional intent with regard to the Pooling Plan. The court erred in finding an exemption from the Commerce Clause despite this lack of clarity, simply because the Pooling Plan was related to another state program that was explicitly covered by this federal law. Congress affirmatively permitted California to implement its fluid milk standards. However, nowhere in section 144 nor the rest of the Farm Bill has Congress authorized California to discriminate against raw milk in interstate commerce.

B. The statute does not manifest an "unmistakably clear" intent by Congress to extend Commerce Clause immunity beyond the fluid milk standards and labeling program.

On its face, section 144 does not reflect an "unmistakably clear" intent to exempt the Pooling Plan from Commerce Clause scrutiny. Section 144 is entitled "Effect on fluid milk standards in State of California" and states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation or requirement regarding (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

(A-68). Notably, the statute does not reference the Pooling Plan at all. *Shamrock*, 146 F.3d at 1182 n.2 ("the pricing and pooling laws are not specifically referenced in the statute").

Section 144 refers only to nutritional standards for milk sold to consumers, rather than the raw milk that is governed by the Pooling Plan. CDFA defines "fluid milk products" as processed consumer products for beverage use. CA Dep't of Food & Agric., *Glossary of Dairy Marketing Terms*. Petitioners concede that Congress intended section 144 to immunize the California nutritional standards for milk sold to consumers from federal interference. There is, however, no mention of raw milk or the Pooling Plan. *Id.* (Raw milk is "[f]arm milk that has not been treated in any way.").

Apparently recognizing that California's 1997 amendments discriminate against interstate commerce,

CDFA and the Ninth Circuit went to great lengths to devise a statutory construction that in section 144, Congress meant more than it said, and also intended to authorize discrimination as to out-of-state dairy farmers. Section 144 is not an affirmative grant of authority. It endows California with no greater power than what the statute expressly permits – *i.e.*, California may implement its fluid milk standards.

Given this absence of direct statutory support, the Ninth Circuit strained to construe the portion of section 144 that reads "or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect" as an affirmative statement of congressional intent. (A-68). Standing alone, this language is certainly not "unmistakably clear." The words give no indication that Congress expressly intended to cover anything beyond the nutritional standards for milk sold to consumers.

Moreover, the fact that the Ninth Circuit changed the language to determine its meaning is a significant indication of the lack of clarity in this language. In fact, if read properly and given their plain meaning as required by this Court's precedent, these words suggest a contrary conclusion to that of the Ninth Circuit. Section 144 states, in relevant part, "to establish or continue *to effect* any law regulation or requirement." *Id.* (emphasis added). "To effect" is a transitive verb meaning "to bring about; accomplish; make happen." *The Random House Dictionary of the English Language Unabridged*, 622 (2d ed. 1987). Transposing words, however, the Ninth Circuit inserted the word "affect," commonly understood to mean 'to have an influence on' when used as a verb. *Id.* at 33 ("to act on; produce a change in"). This led the Ninth Circuit to conclude the following: "It follows that the 1997 amendments which directly *affect* raw milk, indirectly *affect* fluid milk." (A-10) (emphasis added). Based on the differences in meanings of these transposed words, the Ninth Circuit significantly altered the

level of scrutiny actually required by Congress. This allowed the Ninth Circuit to improperly rely on conclusory, unexamined statements about the California milk regulatory programs, and importantly, gave the court grounds to ignore the important differences between raw milk and packaged fluid milk. (A-7 - A-9). Certainly, a provision cannot be "unmistakably clear" if a Court must alter its words.

Proper statutory construction also requires courts to look at the section in its full context. As stated by this Court in *West Virginia University Hospitals, Inc. v. Casey*, the best evidence of the purpose of a statute "is the statutory text adopted by both Houses of Congress and submitted to the President." 499 U.S. 83, 98 (1991); *see also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (holding that statutory provisions shall not be construed out of context and in isolation from the statute as a whole). It is well settled as a matter of statutory construction that where the words of a statute are clear, there is no occasion to "construe" those words. The statute should be given its plain and ordinary meaning. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 & n.19 (1976).

The dairy title of the Farm Bill (sections 141 through 152) (A-62 – A-78) establishes that Congress understood the three programs falling within California's milk program. There is, however, no indication that Congress intended that section 144 would extend beyond California's fluid milk standards and labeling program. By adopting separate provisions to address California's other two milk regulation programs, Congress indicated it knew the programs were distinct.

For example, section 143 expressly dealt with California's pooling program. This section provided that California could preserve its quota system, which it administers through the Pooling Plan, if it chose to join the Federal Order system. (A-65). If Congress had intended

section 144 to provide immunity from federal regulation for California's pooling program, then section 143 would have been unnecessary. Moreover, if California had a blanket exemption from Commerce Clause scrutiny, it would be unlikely the State would even consider joining the Federal Order program.

In addition, in section 145 of the same statute, Congress made clear that it did not intend to extend the broad immunity articulated in section 144 to the Stabilization Plan, the third independent part of the milk program. (A-69). The provision refers to "make allowances," which are one component of the Stabilization Plan. *Stabilization and Marketing Plan*, *supra*, at § 300.3. Congress could not have meant to exempt California from all federal control in one part of the statute and then to apply federal "make allowances" in the next section. If, indeed, Congress intended section 144 to exclude all parts of California milk program from federal regulation, section 145 would have read "*Notwithstanding* § 144, no state shall provide for a manufacturing allowance for the processing of milk in excess of ...." Reinforcing the limited scope of section 144, therefore, Congress did not do so.

A thorough examination of the plain language of section 144 and its purpose in the context of the entire dairy title of the Farm Bill actually suggests that Congress affirmatively contemplated the Pooling Plan, but not in section 144. Moreover, it reveals that where Congress affirmatively contemplated the Pooling Plan, parallel language to section 144 was not included. Thus, no court can properly find that Congress manifested its intention to extend section 144 to the Pooling Plan with unmistakable clarity. The Ninth Circuit should have discontinued its analysis at this point.

C. Under an "unmistakably clear" standard it is improper to base a Commerce Clause exemption on legislative history.

Since the court below could not rely on the statutory language to reach its desired conclusion, it was compelled to turn to legislative history. Although the *Shamrock* court conceded that section 144 of the Farm Bill did not refer to the "pricing and pooling laws," the court below held that this section nonetheless immunized the 1997 Pooling Plan amendments on the basis of isolated statements in the Act's legislative history. The court focused on the statements of Californians, Bill Thomas and Craig Alexander, which were made in congressional hearings before the Subcommittee on Livestock, Dairy and Poultry. (A-8).

There is no evidence that Congress was even aware of these statements and no basis to conclude that the entire legislative body relied on these excerpts from the testimony when it enacted section 144. This reliance on legislative history is improper and constitutes judicial activism at its worst. Indeed, Petitioners ask this Court to find, as a matter of law, that a court cannot rely on selected portions of the legislative history to justify its finding that Congress expressed an "unmistakably clear" intent to create an exemption to the Commerce Clause."[3]

There has been recent criticism of judicial efforts to construe statutes by relying on selected portions of the legislative history. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) ("[i]t is our task… not to enter the minds

3 In *Northeast Bancorp*, this Court expressly declined to evaluate the plain language of the statute. Nonetheless, the direction this Court has taken since the mid-1980s suggests that resort to legislative history necessarily defeats a finding of "unmistakable clarity." 472 U.S. at 169. Petitioners' belief is bolstered by the fact that this Court has not cited *Northeast Bancorp* for that same proposition again.

of the Members of Congress – who need have nothing in mind in order for their votes to be both lawful and effective - but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times"); *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (committee reports, often written by staffers or lobbyists, are not representative of the full Congress' views; reliance on these reports can lead to result that neither Congress or the President intended) (Hall, Goodwin, Anderson and Kozinski, J.J., concurring).

Legislative history cannot establish "unmistakably clear" congressional intent, when the statutory language in context remains ambiguous. As explained in the concurrence in *Green v. Bock Laundry Machine Co.*:

> [t]he meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.

490 U.S. 504, 528 (1989) (Scalia, J., concurring) (emphasis in original).

The Ninth Circuit's efforts to parse the legislative history, find a statement or section of testimony that supports its view, and base its decision on that isolated evidence is, in reality, a means to substitute the court's view for

congressional intent. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 453 (1986) (where the language of a statute is clear, courts cannot replace it with unenacted legislative intent); *Thompson v. Thompson,* 484 U.S. 174, 192 (1988) (by selecting parts of the legislative history, judges may not be able to avoid selecting those sections that support the policies they favor) (Scalia, J., concurring). The legislative history, when viewed in its entirety, is at best ambiguous. Significantly, the Ninth Circuit ignored sections that did not support its intended result. For example, the House Conference Report accompanying section 144 provides that this section applies only to "fluid milk standards and their attendant labeling requirements for milk sold at retail." H.R. Conf. Rep. No. 104-494, at 338 (1996) ("For purposes of this section, the managers intend 'fluid milk' means *milk in final packaged form for beverage use.*") (emphasis added).

To the extent the *Ponderosa* and *Shamrock* courts had to reach for the isolated statements in the legislative history to understand the meaning of section 144, this section cannot be considered "unmistakably clear." Neither the plain meaning of section 144 nor the context of the Farm Bill in its entirety give any indication that Congress intended to override the provisions of the Commerce Clause as to the Pooling Plan. In the absence of "unmistakably clear" evidence of congressional intent, the Ninth Circuit should not be permitted to engage in a legislative function and, in effect, rewrite the statute to achieve its desired objectives.[4]

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4 The administrative record surrounding the promulgation of the 1997 amendments also belies the contention that it was "unmistakably clear" that Section 144 immunized the pooling provisions. In its own analysis of one of the hearings leading up to the adoption of the 1997 amendments, Respondents acknowledged that treating out-of-state milk in a different manner than California milk is treated "increases exposure via an interstate commerce challenge." (A-101). In addition, they determined not to use the terms "out-of-state milk" or "out-of-state handler" because "[u]sing such terms in differentiating out-of-state milk from California milk could increase legal exposure via an interstate commerce challenge." *Id.*

CONCLUSION

For over 65 years, states seeking to protect their local dairy industry from out-of-state competitors threatening their in-state businesses have sought the magic words to ward off the unwelcome results of *Baldwin* and progeny. After *West Lynn,* it should come as no surprise that the latest effort involves a misplaced reliance on the claim that Congress has exempted California's milk programs from interstate commerce clause analysis. However, section 144 of the 1996 Farm Bill hardly creates the unmistakably clear exemption sought by California, and this Court should seize this opportunity to strike down this latest form of legal chicanery resulting from judicial reinterpretation of Congress' intent to create only a fluid milk standard exemption for California.

Wherefore, the Petitioners, Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms respectfully pray that a writ of certiorari issue.

December 26, 2001

Respectfully submitted,

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Although Respondents are not bound by these statements, they clearly establish confusion regarding the scope and meaning of Section 144. If the agency charged with interpreting the statute is confused about its meaning, it is difficult to conclude that the intent underlying the law is "unmistakably clear." *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's constructions of a statutory scheme it is entrusted to administer").

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No. 99-16981, No. 99-16982

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PONDEROSA DAIRY,
Plaintiff-Appellant,

v.

WILLIAM J. LYONS, JR., * Secretary, Department of Food & Agriculture, State of California, and A.J. YATES, Deputy Secretary, Department of Food & Agriculture, State of California,
Defendants-Appellees.

HILLSIDE DAIRY INC., A&A DAIRY, INC., a Nevada S Corporation, MILKY WAY FARM, INC., a Nevada S Corporation, and, L&S DAIRY, INC., a Nevada S Corporation,
Plaintiffs-Appellants,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and A.J. YATES, Deputy Secretary, Department of Food & Agriculture, State of California,
Defendants-Appellees.

May 15, 2001, Argued and Submitted, San Francisco, California

August 9, 2001, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-97-01185-GEB (JFM). D.C. No. CV-97-01179-GEB (JFM). Garland E. Burrell, District Judge, Presiding.

DISPOSITION:
AFFIRMED.

COUNSEL:
Charles H. English, Jr., Ober, Kaler, Grimes & Shriver, Washington, D.C.; John H. Vetne, Newburyport, Massachusetts, for the plaintiffs-appellants.

Andrea Hackett Henningsen, Steefel, Levitt & Weiss, San Francisco, California, for the defendants-appellees.

Warren W. Goedert, Nevada State Dairy Commission, Reno Nevada; Robert F. Bony, Nevada Attorney General's Office, Reno, Nevada, for the amicus curiae.

JUDGES:
Before: Joseph T. Sneed and Barry G. Silverman, Circuit Judges, and John W. Sedwick, District Judge. ** Opinion by Judge Sedwick.

OPINIONBY:
John W. Sedwick

OPINION:

SEDWICK, District Judge:

Appellants (collectively "Ponderosa and Hillside") are dairies located outside California that sell their raw milk to processors located in California. Ponderosa and Hillside brought suit against William J. Lyons[1] and A.J. Yates

(collectively "California"), Secretary and Undersecretary of the California Department of Food and Agriculture, following the 1997 enactment of amendments to California's milk pooling plan.[2] The 1997 amendments made out-of-state dairies, such as Ponderosa and Hillside, subject to the pooling plan for the first time. Three issues are presented on appeal: whether § 144 of the Federal Agriculture Improvement and Reform Act ("Farm Bill") insulates California's 1997 pooling amendments from Commerce Clause challenges; whether appellants' Equal Protection Clause causes of action were sufficiently pled; and whether the pooling plan amendments violate the Privileges and Immunities Clause of the Constitution.

BACKGROUND

California has operated a unique milk price stabilization and marketing program since the 1930's. The program classifies milk products into five categories: Class 1 includes fluid products such as the several varieties of milk; Class 2 includes yogurt, cottage cheese and heavy cream; Class 3 includes frozen milk products; Class 4a includes butter and non-fat dry milk; and Class 4b includes cheeses. The program establishes minimum prices for raw milk depending upon the class of product for which the milk will be used. The program was created to address destructive trade practices that resulted because processors that predominantly made Class 1 products could afford to pay more for raw milk than could processors making other classes of products.[3]

The California legislature enacted the Gonsalves Milk Pooling Act of 1967 to address market disparities that resulted from the existing price stabilization and marketing program. California's pooling plan seeks to eliminate pricing inequalities by pooling the revenues generated by the sale of raw milk and redistributing the revenues among all producers according to a blended price that is based on milk usage across the state regardless of the use for which a particular

producer's milk is purchased. At the same time, the minimum prices that are used to calculate each processor's obligation to the pool for raw milk ("pool obligation") vary according to the end-product produced. Accordingly, Class 1 processors typically have a larger pool obligation than do processors of other end products. In sum, the pooling system reduces the competition among dairy farmers for contracts with Class 1 processors and reduces the incentives Class 1 processors have to extract concessions from the dairies that supply their milk.

The pooling plan redistributes the pooled revenues according to a quota system that includes both a quota and an over-base price. California producers are allocated quota share based upon their historic Class 1 milk production. Quota shares can also be purchased from other producers. Owning quota is beneficial because quota price exceeds overbase price by $ 1.70/hundredweight and producers are paid at quota price for milk contributed to the pool up to the amount of quota shares they own. The lesser, overbase price is paid for milk contributed to the pool in excess of quota. Consequently, many producers have elected to purchase quota shares in order to maximize the price they receive for their raw milk.

Each month, the California Department of Food and Agriculture calculates the gross amount each processor owes its various producers.[4] Processors are authorized to subtract from the gross amounts certain deductions such as transportation and regional quota allowances.[5] Where the total value of milk that a processor uses is greater than the amount the processor owes its producers, the processor pays the difference into the pool equalization fund. Conversely, a processor is paid from the pool equalization fund when the total amount the processor owes its producers exceeds the value of the milk it used.

Prior to the 1997 amendments, out-of-state producers who sold milk to California processors were not included in

the pooling plan. Processors paid out-of-state producers directly and the milk purchased from those producers was not included in the processor's total pool obligation. Under the amended plan, milk purchased from out-of-state producers is counted towards each processor's total pool obligation and processors are credited the lesser of their in-plant blend price[6] or the quota price regardless of how much the processor pays the out-of-state producers.

In an order dated July 30, 1998, the district court granted California's motion to dismiss with respect to all of the causes of action raised by the two complaints save those based on the Commerce Clause of the Constitution. Pertinent to the appeal, the dismissed causes of action included claims that were premised on the Equal Protection and Privileges and Immunities Clauses of the Constitution. The Equal Protection Clause causes of action were dismissed because the district court found that they were not sufficiently pled. The Privileges and Immunities Clause causes of action were dismissed because the district court found that the pooling plan does not discriminate against nonresidents.

In an order dated July 21, 1999, the district court granted California's motion for summary judgment and dismissed the remaining Commerce Clause causes of action. The court relied on *Shamrock Farms Co. v. Veneman, 146 F.3d 1177 (9th Cir. 1998)*, which it found stood for the proposition that § 144 of the Farm Bill immunizes California's pooling plan from Commerce Clause challenges. Final judgment as to each case was entered on August 3, 1999. This appeal followed.

DISCUSSION

A. Shamrock Precludes Commerce Clause Claims.

Reviewing the district court's grant of summary judgement de novo and viewing the evidence in the light most favorable to Ponderosa and Hillside, see *Balint v.*

Carson City, 180 F.3d 1047, 1050 (9th Cir. 1999)(en banc), we find that there were no genuine issues of material fact and the district court correctly applied the relevant substantive law. Shamrock forecloses Ponderosa and Hillside's Commerce Clause claims.

Shamrock involved Commerce Clause and Fourteenth Amendment challenges to California's milk laws. The Shamrock plaintiffs were an Arizona dairy and processor who regularly distributed packaged fluid milk in California. Their complaint alleged that California's milk composition requirements, which mandate minimum identity standards for the solids-not-fat content of fluid milk, effectively precluded them from distributing whole and skim milk in California during certain seasons of the year and from distributing low-fat milk in California during the whole year. The Shamrock plaintiffs could not meet the minimum identity standards because they did not fortify, standardize or otherwise alter the solids-not-fat content of the milk they distributed. Also at issue were fortification allowances which, according to the Shamrock plaintiffs, provided an unfair competitive advantage to in-state processors. The district court granted California's motion to dismiss and this court affirmed. Both courts found that Congress, in enacting § 144 of the Farm Bill, intended to protect the milk composition requirements from Commerce Clause limitations. See *Shamrock, 146 F.3d at 1178, 1180.*

The appellate court premised its decision on the language of § 144. Section 144 provides,

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding: (1) the percentage of

> milk solids or solid not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fats.

7 U.S.C. § 7254. The unanimous panel found the" any other provision of law" language persuasive and indicative of Congress' intent to create "a blanket exclusion" for California's composition requirements. See *id. at 1180-81.* With respect to the pricing and pooling laws, the appellate court analyzed the connection between those laws and composition requirements and found them to be "interrelated and mutually interdependent." *Id. at 1182.* Because of this connection, the court stated that the pricing and pooling laws "fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards" that is stated in § 144. *Id. at 1182.* As a result, the court concluded that the pricing and pooling laws were also exempt from Commerce Clause challenge. See id.

The district court applied Shamrock to this case and held that § 144 of the Farm Bill insulates all of California's milk pricing and pooling laws from Commerce Clause challenges, including the 1997 amendments challenged by Ponderosa and Hillside. Ponderosa and Hillside argue that Shamrock should be read narrowly and interpreted only to exempt California's fortification allowances from Commerce Clause scrutiny. It is their position that the Shamrock court borrowed "imprecise terminology" when it referred to the fortification allowances as the 'pricing and pooling provisions' and did not mean to hold that all of the pricing and pooling laws were indirectly necessary to the composition standards and within the reach of § 144.

Ponderosa and Hillside invite us to dissect Shamrock even though that the language in Shamrock is clear. Shamrock broadly refers to the pricing and pooling laws and

finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges. Moreover, § 144 insulates the 1997 amendments despite the fact that the amendments went into effect after § 144 was enacted. Once Congress has exercised its Commerce Clause power and held that certain state laws are immunized from challenge, later enacted state laws are also exempt so long as the laws are consistent with the protection provided. *Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652-53, 101 S. Ct. 2070, 2075, 68 L. Ed. 2d 514 (1981).*

Ample evidence demonstrates that the pooling laws in general, and the 1997 amendments in particular, bolster California's composition requirements and are consistent with the protection provided by § 144. As observed in Shamrock, the legislative history of § 144 and the language of the pricing and pooling laws themselves demonstrate that California's pricing and pooling laws were considered to be an important element of California's milk regulatory scheme and necessary to maintain the "standards of content and purity "for milk. See *Shamrock, 146 F.3d at 1182* (citing Hearing Testimony Before the Subcomm. on Livestock, Dairy and Poultry, 104th Cong., Apr. 20, 1995, and Cal. Food & Agr. Code § 61802(c)). Accordingly, Shamrock found that § 144 broadly protected California's pricing and pooling laws. See id. Nothing in the 1997 amendments requires a different conclusion in this case.

In adopting the 1997 amendments, the California Department of Food and Agriculture's explained,

> Moreover, the existing regulatory distortion fosters the inefficient movement of milk by moving such milk over great distances at increased costs. Milk, which would have otherwise served its local markets, is now

> being moved hundreds of miles in each direction with significant increases in transportation and labor costs, expanded environmental costs and introduced a speculation factor that overrides existing practices of milk marketing.
>
> This is directly contrary to the public policies underlying the administration of the pooling program as set forth in the governing statues to promote, foster, and encourage the intelligent production and orderly marketing of fluid milk to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers. Competitive market conditions should determine the movement of milk, not inappropriate regulatory pool provision which otherwise distort the economic signals of the marketplace.

Statement of Determination and Order of the Secretary of Food and Agriculture Regarding the Proposed Amendments to the Pooling Plan For Milk Based Upon Public hearings Held On December 6, 1996 and February 4, 1997, A.J. Yates, Undersecretary, California Department of Food and Agriculture, March 21, 1997. This explanation fits the 1997 amendments into the context and purpose of the pricing and pooling laws as a whole. It follows that § 144 must also insulate the 1997 amendments from Commerce Clause challenges.

Ponderosa and Hillside also contend that Shamrock is inapposite because § 144 only affects California's ability to regulate standards for "fluid milk products sold at retail or marketed in the State of California," as opposed to raw milk

which is the focus of the present challenge. Ponderosa and Hillside's argument is unpersuasive because § 144 applies to "any provision of law" that "directly or indirectly" has an effect on fluid milk. Raw milk and fluid milk are closely related. It follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk.

To the extent that Shamrock reaches pooling regulations beyond the fortification allowances, Ponderosa and Hillside argue that the holding is dictum and need not be followed. This argument is unpersuasive. Shamrock's holding with respect to the pricing and pooling regulations cannot be dictum because at least some of the pricing and pooling regulations were directly at issue. See *United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988)* (citation omitted) (defines dictum as "[a] statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding --that, being peripheral, may not have received the full and careful consideration of the court that uttered it."); see also *Batjac Productions Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223, 1232 (9th Cir. 1998)*. In sum, Ponderosa and Hillside's Commerce Clause arguments are generally inconsistent with our reading of Shamrock. We therefore reject the arguments. "Only an en banc panel may overturn existing Ninth Circuit precedent." *Jeffries v. Wood, 114 F.3d 1484, 1492 (9th Cir. 1997)*.

B. Equal Protection Clause

Ponderosa's amended complaint alleges that the 1997 amendments to the pooling plan violate the Equal Protection Clause of the Constitution. In its entirety, Ponderosa's Equal Protection Clause claim alleges:

> 71. Plaintiffs reallege and incorporate by reference the allegations of paragraph 1 through 70 of this Complaint.

> 72. The stabilization and marketing provision of Div. 21, Pt., 3, Ch. 2 of the Food & Agriculture Code, and/or the pooling provisions of Div. 21, Pt. 3, and Ch. 3.5 of the California Food & Agriculture Code, and the marketing or pooling plans issued thereunder, as construed and applied by defendants herein, violate the 14th Amendment of the Constitution of the United States, relating to equal protection, due process, "taking" of private property, privileges and immunities, and/or other incorporated provisions of the Bill or [sic] Rights.

The district court dismissed Ponderosa's claim based on Federal Rule of Civil Procedure ("Rule") 8(a)(2).[7] Nevertheless, the court afforded Ponderosa 20 days to file a second amended complaint to cure the deficiencies. Ponderosa did not file a second amended complaint.

Ponderosa argues that it sufficiently pled an Equal Protection Clause claim because its complaint contains 18 paragraphs that illustrate how specific elements of the amended pooling plan discriminate against out-of-state dairies. Specifically, Ponderosa enumerates six distinct ways in which its amended complaint illustrates how the pooling plan treats out-of-state producers unequally:

> 1) quota shares only allocated to in-state dairy producers, while out-of-state farmers are not eligible to receive or to purchase the same;
>
> 2) out-of-state farmers contribute to the revenue pool but are unable to fully participate in the benefits of the pool;

3) out-of-state producers are not eligible to benefit from revenue stability guarantees and thus, unlike in-state producers, are not guaranteed to receive a pool price for milk regardless of location or classified values;

4) in-state quota holders routinely receive higher prices than do out-of-state producers;

5) unlike in-state producers, out-of-state producers are unable to acquire, hold, transfer or sell quota shares; and

6) unlike in-state producers, out-of-state producers are not entitled to transportation allowances to off-set costs associated with the transportation of their milk to processing plants.

Shamrock recognizes that California has a legitimate interest in establishing pricing and pooling laws. See *Shamrock, 146 F.3d at 1183.* Where legitimate interests have been identified, a claimant must do more than assert that the laws being challenged establish discriminatory classifications. See id. "The complaint must also allege facts to demonstrate that the classifications are arbitrary or that they are not rationally related to legitimate state interests." Id .Ponderosa did not do so. The allegations that Ponderosa identifies in its complaint highlight allegedly discriminatory practices, but do not, when taken as true, demonstrate why the challenged elements of the plan are arbitrary or why they are not related to legitimate state interests. It follows that Ponderosa's claim was insufficient. Moreover, when afforded the opportunity to amend its complaint to correct the deficiencies therein Ponderosa did not do so. The district court is therefore affirmed. See *McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996)* (dismissal of a complaint is reviewed for abuse of

discretion where plaintiff fails to amend the complaint to comply with a court order that requests an amendment).

C. Privileges and Immunities Clause

The district court dismissed Ponderosa's Privileges and Immunities Clause claim because it found that the amended pooling plan does not create any classifications based on residency or citizenship. A district court's dismissal will be affirmed if it appears beyond doubt that the plaintiff-appellant can prove no set of facts that would entitle it to relief. See *Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000).* Ponderosa contends that district court's decision was in error because the amended pooling plan discriminates against those who produce milk out-of-state which, for all intents and purposes, means those who are residents of other states. We disagree and affirm.

The Privileges and Immunities Clause provides "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV § 2. The Privileges and Immunities Clause is not the source of federally protected rights. Rather, the Privileges and Immunities Clause "relieves state citizens of the disabilities of alienage in other States and ... inhibit[s]discriminatory legislation against them by other States." *Paul v. Virginia, 75 U.S. 168, 180, 19 L. Ed. 357 (1869).* Put another way, the main purpose of the Privileges and Immunities Clause is "to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell, 334 U.S. 385, 395, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460 (1948).* It "outlaws classifications based on ... non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Id. at 398.*

The claims of the corporate dairies must be dismissed because corporations may not bring Privileges and Immunities Clause claims. *Western and Southern Life Ins.*

Co., 451 U.S. at 656. There is also no violation with respect to the individual dairy owners because the classifications the pooling plan amendments create are based on the location where milk is produced. The amendments do not, on their face, create classifications based on any individual's residency or citizenship. Consequently, Ponderosa's argument must fail. See *Giannini v. Real, 911 F.2d 354, 357 (9th Cir. 1990)* ("discrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause").

AFFIRMED.

Footnotes

* William J. Lyons, Jr., is substituted for his predecessor, Ann M. Veneman, as Secretary of the Department of Food & Agriculture for the State of California.

** The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

[1] When this case began, Ann M. Veneman was the Secretary of the California Department of Food and Agriculture.

[2] The State of Nevada has been permitted to participate as an amicus curiae on behalf of Ponderosa and Hillside dairies.

[3] Because of this phenomenon, producers, i.e., dairies, had an incentive to sell their milk to processors of Class 1 products and competition for contracts with such processors arose. This competition placed producers in a weak bargaining position vis-a-vis Class 1 processors and forced many to make concessions as a cost of securing contracts with Class 1 processors.

[4] The calculations are based on the amount of raw milk purchased from any given producer and the end products for which the milk purchased is used. An "in-plant blend price" representing an average price for the milk each processor purchases is also calculated.

[5] Transportation allowances compensate producers for the cost of hauling milk from the farm to the processing plant. Regional quota allowances are used to encourage the movement of quota milk to Class 1 processing plants and are determined according to the geographical location of dairy farms.

[6] See supra note 5.

[7] Rule 8(a)(2) requires "a short and plain statement of a claim showing that the pleader is entitled to relief." According to the district court, Ponderosa's claim was conclusory and its request to rely upon discovery to plead additional facts improper.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S 97-1179 GEB JFM

HILLSIDE DAIRY, et al.,
Plaintiffs,

v.

WILLIAM J. LYONS, JR.,
Defendant.

CIV S 97-1185 GEB JFM

PONDEROSA DAIRY, et al.,

v.

WILLIAM J. LYONS, JR.,
Defendant.

Filed July 21, 1999

ORDER

The hearing on the parties' cross motions for summary judgment was held July 19, 1999. Charles English, Rebecca Ceniceros, and Wendy Yoviene appeared on behalf of Plaintiffs Hillside Dairy, A & A Dairy, L & S Dairy, and Milky Way Farm, Inc.; John Vetne and Michael Vergara appeared on behalf of Plaintiffs Ponderosa Diary, Pahrump Dairy, Rockview Dairies, Inc., and D. Kuiper Dairy; and Leonard Stein and Andrea Hackett appeared on behalf of Defendant William J. Lyons, Jr. Defendant argued that he is entitled to summary judgment on Plaintiffs' remaining challenges under the Commerce Clause to certain

amendments to California's milk pooling and pricing laws ("Amendments") Specifically, Defendant argued these Amendments are immune from Commerce Clause challenge and, in the alternative, chat they do not violate the Commerce Clause because they treat in-state and out-of-state milk producers evenhandedly. Plaintiffs countered that they are entitled to summary judgment because the Amendments are not immune from Commerce Clause challenge and because the Amendments unlawfully discriminate against out-of-state milk producers For the reasons stated below, Defendant's motion is granted and Plaintiffs' motion is denied.

I
BACKGROUND

California's unique milk pricing and pooling laws were designed to regulate and stabilize the state's milk market. See Cal. Food & Agric. 61801. Through a system of pooling revenues, these laws establish minimum prices of raw milk for California producers and determine the value of milk received by California processors, which, in turn, determines the individual processor's pool obligation. Although California processors were previously able to satisfy their pool obligation by purchasing all their milk from out-of-state producers because they were credited for such purchases at an amount equal to their pool obligation, under the Amendments, California processors can no longer satisfy their pool obligation by simply purchasing out-of-state milk. Plaintiffs assert that the Amendments effectively prohibit out-of-state milk producers from selling their products at competitive prices with California milk producers and impose an undue burden on interstate commerce.

II
STANDARD OF REVIEW

Summary judgment is appropriate where the record shows an absence of a genuine issue of material fact entitling the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Carrett, 477 U.S. 317, 322 (1986). The movant has the initial burden of establishing the absence of genuine issues of material fact- Fed. R. Civ. F. 56(c). Once the movant has met its burden, the nonmovant must make a sufficient showing on matters on which it will have the burden of going forward with evidence at trial. Marsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986) "The inquiry involved in ruling on a motion for summary judgment. necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Thus, "[o]n cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trail." Cabo Distributing Co., Inc. v. Brady, 821 F. Supp. 601, 607 (N.D. Cal. 1992).

When cross motions for summary judgment are filed, the ordinary implication is that no disputed issues of material fact exist and that the dispute may be decided as a matter of law. A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1417, n.1 (9th Cir. 1986) Nevertheless, the Court must determine whether the parties have raised issues of material fact that make summary judgment inappropriate. Id.

> A "material" tact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors, Ass'n, 809 F2d 626, 630 (9th Cir. 1987).

III
DISCUSSION

Defendant argues that since Congress has explicitly immunized California's milk pooling and pricing laws from Commerce Clause challenge he is entitled to summary judgment. See Def.'s Opening Br. at 25. While Plaintiffs concede that "Congress may authorize a state to impose regulations that would otherwise violate the Commerce Clause," they argue that "[t]here is no evidence of Congressional intent, clear or otherwise, to authorize California to adopt the pooling plan amendments at issue in this case."[1] Pls.' Opp'n at 12.

To the contrary, in Shamrock Farms Co. v. Veneman, 146 F.3d 1177 (9th Cir. 1998), the Ninth Circuit held that, in section 144 of the Farm Bill 7 U.S.C. 7254, Congress immunized California's milk pricing and pooling laws from Commerce Clause challenge. Id. at 1182. Section 144 states the following:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding-
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; Or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Both in their briefs and at oral argument, Plaintiffs argued that the Ninth Circuit's ruling in Shamrock on California's milk pricing and pooling laws is dictum and that section 144 cannot apply to the Amendments at issue here because section 144 is "expressly limited to the content and labeling of 'fluid milk products sold at retail'" and because the Farm Bill was enacted prior to the adoption of the Amendments.[2] Pls.' Opp'n at 12-13. These arguments are unavailing. Because California's milk pricing and pooling laws were directly challenged under the Commerce Clause in Shamrock, 146 F.3d at 1179, the Ninth Circuit's ruling in that case on California's milk 'pricing and pooling laws is not dictum. Cf. United States v Morning, 64 E.3d 531, 535 n.4 (9th Cir. 1995) (stating that dictum is discussion unnecessary to the decision in a case) . Moreover, while acknowledging that section 144 does not "specifically refer to" California's milk pricing and pooling laws, which pertain to minimum prices for raw milk, the Ninth Circuit unequivocally concluded that "the pricing and pooling provisions fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards" and Concluded that, since these provisions were "an essential part of California's plan to maintain its milk composition standards," they are "also exempted from Commerce Clause challenge." Shamrock, 146 F.3d at 1176, 1182. Thus, section 144 plainly authorizes California's milk pooling and pricing laws including the Amendments at issue.[3]

"When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northeast Bancorp, Inc., v. Board of Governors, 472 U.S. 159, 174 (1985); see also White v. Massachusetts Council of Constr. Employers, Inc.,

460 U.S. 204, 213 (1983) ("Where a state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652—53 (1981) ("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."). "Congress has insulated California's milk laws against Commerce Clause challenges." Shamrock, 146 F.3d at 1183. Accordingly, Plaintiffs' Commerce Clause challenges to the Amendments fail.

IV
CONCLUSION

Since the Amendments are immune from Commerce Clause challenge, Defendant is granted summary judgment on Plaintiffs' remaining claims. The Clerk of the Court is directed to enter judgment in favor of Defendant and against Plaintiffs.

IT IS SO ORDERED.
Dated: July 21, 1999

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Footnotes

[1]At oral argument, Plaintiffs also argued that, at most, Shamrock might provide Defendant with an affirmative defense, which Defendant has not pled. Even assuming the truth of this assertion, "[i]n the absence of a showing of prejudice, however, an affirmative defense may be raised for the first time at summary judgment." Camarillo v. McCarthy,

998 F.2d 638, 639 (9th Cir. 1993). Since Plaintiffs have not claimed prejudice, Defendant's reliance on Shamrock is appropriate. See Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984)

[2] Plaintiffs also argued in their briefs and at oral argument that "judicial review of administrative decision making is limited to the administrative record" and that "defendants know that § 144 of the Farm Bill is not applicable to the pooling plan amendments." Pls.' Opp'n at 13, 15. These arguments are irrelevant to the question presented: whether Congress immunized California's milk pricing and pooling laws from Commerce Clause challenge by enacting section 144.

[3] "[T]he legislative history surrounding the passage of § 144 of the Farm Bill . . . demonstrates that Congress intended that the milk pricing and pooling scheme be included as a means of effecting California's milk composition Shamrock, 146 F.3d at 1182. These jaws "were considered by all concerned to be an important element of California's milk regulation scheme." Id.

No. 97-15428

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHAMROCK FARMS COMPANY and SHAMROCK FOODS COMPANY,
Plaintiffs-Appellants,

v.

ANN M. VENEMAN, Secretary, Department of Food & Agriculture, State of California, RICHARD TATE, Chief, Milk and Dairy Foods Control Branch, Division of Animal Industry, Department of Food & Agriculture, State of California,
Defendants-Appellees.

February 11, 1998, Argued, Submitted, San Francisco, California

July 2, 1998, Filed

SUBSEQUENT HISTORY:
Certiorari Denied January 19, 1999, Reported at: *1999 U.S. LEXIS 614.*

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-96-00889-LKK. Lawrence K. Karlton, District Judge, Presiding.

DISPOSITION:
Shamrock's claims pursuant to Rule 12(b)(6) properly dismissed.

COUNSEL:

John H. Vetne, Blodgett, Makechnie & Vetne, Newburyport, Massachusetts, for the plaintiffs-appellants.

Leonard R. Stein, Steefel, Levitt & Weiss, San Francisco, California, for the defendants-appellees.

JUDGES:

Before: Dorothy W. Nelson, Robert Boochever, and Stephen Reinhardt, Circuit Judges. Opinion by Judge Reinhardt.

OPINION BY:

STEPHEN REINHARDT

OPINION:

OPINION

REINHARDT, Circuit Judge:

Shamrock Farms operates a dairy farm in Arizona and sells the raw milk it produces to Shamrock Foods, a milk processor also located in Arizona. Shamrock Foods distributes packaged fluid milk products to a number of western states, including California. Together, Shamrock Farms and Shamrock Foods (collectively "Shamrock") filed suit against the state of California in federal district court alleging that various California laws and regulations governing the sale of milk products in that state violate the Commerce Clause. Shamrock asserts that the California provisions effectively prohibit out-of-state milk producers from selling their products in that state and impose an undue burden on interstate commerce. The district court dismissed Shamrock's claims pursuant to Fed. R. Civ. P. 12(b)(6), holding that a federal statute clearly authorizes California's laws and regulations and insulates them from Commerce Clause challenges.

BACKGROUND

At issue in this case are various California regulations that govern the composition of consumer milk, in particular, those governing the content of both milkfat and solids-not-fat ("SNF"), as well as various California laws that govern milk pricing and pooling. The term "SNF" simply refers to solids (other than milkfat) naturally found in raw milk, which contain nutrients such as protein and calcium. The fat and SNF content of milk varies from "breed to breed, region to region, season to season, plant to plant, and farm to farm." It is possible to increase or standardize the natural SNF content of milk by adding a fortifying agent such as milk powder or condensed milk. When the SNF content is increased, the nutritional value of the milk increases as well.

Milk produced and distributed by Shamrock is subject to regulation by various federal agencies, including the Department of Agriculture, the Food and Drug Administration ("FDA"), and the Department of Health and Human Services ("HHS"). Pursuant to the Food, Drug and Cosmetic Act, the FDA and HHS have adopted standards of identity with respect to the milkfat and SNF content of milk sold in Shamrock's geographic region. *21 U.S.C. § 341.* These federal identity standards, which are designed to inform consumers about the content of the milk they purchase and to protect against fraud and misrepresentation, require all milk (whether whole milk, lowfat milk, or skim milk) to be not less than 8.25% SNF. This percentage roughly reflects the average natural SNF content of all raw milk.

The state of California has adopted higher identity standards for milk sold within its borders. In order for milk processors to comply with California's compositional standards, they must fortify most of their milk by adding condensed milk or milk powder. Because Shamrock does not fortify, standardize, or otherwise increase the SNF content of its milk, it is effectively prohibited from selling whole and

skim milk in California during certain seasons of the year. California's standards also effectively prohibit Shamrock from distributing its lowfat milk during the entire year.

In addition to regulating the composition of milk, California has also adopted milk pricing and pooling laws, which are designed to regulate and stabilize the state's milk market. Under these laws, all milk produced in California is pooled, and the state then sets minimum prices that California processors must pay individual California producers for the share of the raw milk they have supplied. These prices are based in part on the SNF content - the lower the SNF content, the lower the price. California also provides its milk processors with a fortification allowance, which reduces the cost of standardizing the milk. Shamrock asserts that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors.

Shamrock filed a complaint alleging that California's application of its milk composition standards and its pricing and pooling laws violates the Commerce Clause and the Fourteenth Amendment. Shamrock sought declaratory and injunctive relief, seeking to stop the state from enforcing its standards. California promptly moved to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and the district court granted the motion. Shamrock moved for reconsideration of the dismissal order, which the district court denied. Shamrock appeals.

DISCUSSION

I. COMMERCE CLAUSE

Shamrock asserts that California's milk composition standards and pricing and pooling laws are violative of the Commerce Clause because they prohibit the free flow of milk products across state lines. Assuming that the facts alleged in the complaint are true, as we must when considering an

appeal from a dismissal under 12(b)(6), we consider whether the district court correctly concluded that the laws and regulations at issue are exempt from challenge under the Commerce Clause. A dismissal under Rule 12(b)(6) is reviewed *de novo*. *See Cohen v. Stratosphere Corp., 115 F.3d 695, 700 (9th Cir. 1997).*

In addition to being an affirmative grant of congressional authority, the Commerce Clause, which authorizes Congress "to regulate Commerce . . . among the several states," U.S. Const. art. I, § 8, cl. 3, is in its negative aspect also a limitation on the regulatory authority of the states. *See Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824)* (Marshall, C.J.). Thus, although a state has power to regulate commercial matters of local concern, a state's regulations violate the Commerce Clause if they are discriminatory in nature or impose an undue burden on interstate commerce, either because they are not necessary to further the state's legitimate interests or because they "unreasonably favor[ ] local producers at the expense of competitors from other States." *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 154, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)* (citations omitted). If a state's laws are found to be nothing more than "economic protectionism" in disguise, they will be invalidated as a matter of course. *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).* Even laws that are applied evenhandedly and impose only an incidental burden on interstate commerce can be unconstitutional if the burden on commerce is "'excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).*

Notwithstanding these limitations on permissible state action, Congress has the authority to immunize state laws from Commerce Clause challenges. *Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 653, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981); see also White v.*

Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 213, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983) (noting that if state regulation is "specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce"). In this case, California maintains that Congress insulated its milk laws and regulations from Commerce Clause challenges by enacting § 144 of the Federal Agriculture Improvement and Reform Act of 1996 (the "Farm Bill"). *See* Pub. L. No. 104-127, 110 Stat. 888 (1996). Accordingly, argues California, there is no need to assess the validity of its laws and regulations by determining whether the burden on commerce is justified in relation to the state's interest. *See Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).* If California's contention is correct and Congress has afforded its milk laws and regulations the protection it claims, there can be no merit to Shamrock's Commerce Clause argument. Our analysis thus turns on whether Congress has indeed authorized California to adopt and enforce its regulatory scheme regardless of the effect it may have on interstate commerce.

In 1990, Congress enacted the Nutritional Labeling and Education Act of 1990 ("NLEA"), a provision of which prohibits states from independently setting quality standards for foods that move in interstate commerce. Under the NLEA, however, the FDA has the authority to exempt certain state food standards from the NLEA's general preemptive effect. *21 U.S.C § 343-1*(b). After the NLEA was passed, California petitioned the FDA for authorization to maintain its stringent standards for fluid milks. Before California received FDA approval, Congress passed the Farm Bill. Included in the Farm Bill is a provision that specifically applies to California's milk standards and eliminates the need for the state to obtain an exemption:

> Nothing in this Act or *any other provision of law* shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:
>
> 1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> 2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7254 (emphasis added).

California's milk standards and its pricing and pooling laws constitute an integrally related scheme. Because § 144 of the Farm Bill specifically refers only to the milk standards, we will discuss its effect on that part of the scheme first and then discuss its effect on the pricing and pooling laws.

A.

It is evident that Congress intended to insulate California's milk standards from federal regulation, including under the NLEA: The statute clearly states that nothing in the Farm Bill "or any other provision of law" shall interfere with California's efforts to regulate the SNF content of milk sold within its borders. Shamrock argues, however, that although the statute may be clear with respect to insulating the regulations from preemption or prohibition under federal regulation, it is ambiguous with respect to whether it insulates California's regulations from challenges under the Commerce Clause. *See Wyoming v. Oklahoma, 502 U.S. 437,*

439, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992) (construing the Federal Power Act as insulating state laws from preemption, but not from the Commerce Clause).

As the Supreme Court has explained, if Congress intends to authorize state laws that violate the Commerce Clause, its intent must be manifest. "Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause." *C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 408, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994)* (O'Connor, J., concurring) (quoting *South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)).* The requisite intent may be gleaned both from the language of the relevant statute and from the legislative history. *See Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 960, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982).*

In light of the breadth of the language contained in the statute, we conclude that the state has met its burden of establishing that Congress intended to protect the milk standards from Commerce Clause limitations. Shamrock argues that the language "any other provision of law" is not broad enough to include the Commerce Clause. We disagree. We hold that by using the expression "any other provision of law" in the context it did here, Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law.

If Congress had wanted to protect California's milk standards only against the proscriptions of federal statutes and regulations, it could easily have chosen to use narrower language, such as "any federal law or regulation." This phrase plainly refers to statutory enactments, their implementing rules and regulations, and probably even to decisional law. It is the type of phrase Congress used later in the same paragraph of the Farm Bill when, in referring to the

means of establishing California's milk standards, it specifically referred to "any law, regulation, or requirement." By contrast, a general reference to any or all "law" connotes a much broader concept. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 503 (2d ed. 1995) (noting that "a law" refers to "a particular and concrete instance of a legal precept," whereas "the law" describes "something much broader and more general"); "any other provision of law" is closer to "the law" than to "a law."

We are aware of no authority that would permit us to conclude that the Commerce Clause, or, for that matter, the Full Faith and Credit Clause, or the provision of the Twenty-Second Amendment to the Constitution that prohibits the election of any person to the Office of President more than twice, do not constitute "provisions of law." While neither the Constitution nor any individual article or amendment may be "a law," constitutional provisions are in ordinary English usage "provisions of law." That the Constitution is part of the law of this nation would seem to be beyond dispute.

We note also that the protection the Farm Bill affords California's milk standards is sweeping. It does not simply bar preemption. Rather, it states that no provision of law shall "preempt, prohibit, or otherwise limit" California's milk laws or regulations. The breadth of the Farm Bill's protection for California's milk standards fortifies our view that by using the term "any other provision of law," Congress intended to preserve those standards from any sort of challenge, including one based on Commerce Clause grounds.

Shamrock asserts that *Wyoming v. Oklahoma, 502 U.S. 437, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992),* and *United Egg Producers v. Department of Agric., 77 F.3d 567 (1st Cir. 1996),* support its contention that while such a conclusion may indeed be possible, it is not consistent with the Supreme Court's jurisprudence in this area. We do not agree that either *Wyoming v. Oklahoma* or *United Egg* is of any assistance to

Shamrock. In *Wyoming v. Oklahoma*, the issue was whether the so-called "saving clause" in the Federal Power Act,[1] which allowed states to regulate local electric power rates notwithstanding federal regulation over the electric power industry, also permitted Oklahoma to stabilize its rates by enacting discriminatory legislation. The Supreme Court struck down the state laws, finding that Congress had not evinced a clear intent to immunize all state laws related to power-rate regulation even when such laws interfered with interstate commerce. From the language of the statute ("lawful authority now exercised"), the Court reasoned that Congress merely intended to maintain the status quo, to preserve regulations that were lawful under the dormant Commerce Clause limitations on state regulation. *502 U.S. at 458*. In other words, Congress intended to permit the states to carry on any and all activities in which they were *lawfully* engaged at the time of the passage of the act. If any of the state activities were unlawful at that time, either because they were in violation of some federal statute or in violation of the Constitution, the Act did not purport to make them lawful. Thus, the Federal Power Act preserved lawful state regulations and exempted them from preemption under that particular Act.

By contrast, the statutory language in the Farm Bill creates a blanket exclusion for California's milk standards, not just those considered to be "lawful" at the time of the bill's enactment. Moreover, the Farm Bill insulates those standards from "any provision of law" that may "otherwise limit" California's authority to maintain them, and not just from the provisions of the Farm Bill *itself*. Accordingly, *Wyoming* is clearly distinguishable from this case.

In *United Egg*, the First Circuit recently considered a Commerce Clause challenge to a Puerto Rican law that required all eggs imported into the commonwealth to bear a stamp indicating the state of origin. Puerto Rico argued that its egg regulations were authorized by Congress, relying on

the Egg Products Inspection Act. *21 U.S.C. § 1052*(b)(2). That Act provided:

> No State or local jurisdiction other than those in noncontinguous areas of the United States may require labeling to show the State or other geographical area of production or origin.

77 F.3d at 569. The First Circuit rejected Puerto Rico's argument that this exemption signified "approval of any and all egg-labeling requirements in those places regardless whether justified or unjustified by Dormant Commerce Clause considerations." *Id.* Instead it concluded that "Congress excepted . . . Puerto Rico from the blanket prohibition it was placing upon egg-labeling in all other places." *Id.* The statute thus purported to insulate egg labeling laws *only* from the ban contained in the very same statute; it did not insulate egg labeling from any other provision of law. Additionally, the court stated that the legislative history was silent as to whether Congress intended for the exemption to insulate egg laws from Commerce Clause limitations. Accordingly, the court was unwilling to read the statute as broadly as Puerto Rico urged.

In this case, the relevant statutory language is of a wholly different character than the language in the egg labeling ban and the language of the statute in *Wyoming*, both of which protected state laws from being declared illegal under those particular statutes, and no more. Here, Congress was unmistakably clear in exempting California's milk standards from *all* provisions of law, wherever situated, not from coverage under a single statute.

B.

Having determined that the milk compositional standards are immune from Commerce Clause challenge, we now turn

to the pricing and pooling laws. Although § 144 of the Farm Bill does not specifically refer to these laws, as it does to the milk composition standards, we conclude that the pricing and pooling provisions fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards. As we have noted, the various elements of the milk fortification scheme are interrelated and mutually interdependent. The pricing and pooling provisions are, in short, an essential part of California's plan to maintain its milk composition standards.

Our task in this respect is made somewhat less difficult by Shamrock's concession during oral argument that the pricing and pooling laws were adopted in order to assist milk producers in complying with the milk content provisions. This concession is amply supported by the legislative history surrounding the passage of § 144 of the Farm Bill, which demonstrates that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards.[2] *See Hearings Before the Subcomm. on Livestock, Dairy and Poultry*, 104th Cong., Apr. 20, 1995 (statement of Hon. Bill Thomas) (explaining that the success of California's milk standards is attributable to the state's pricing system); *see also id.* (statement of Craig S. Alexander, Dairy Institute of California) (discussing California's pricing and pooling system in the context of California's milk quality standards). From all accounts, the milk pricing and pooling laws were considered by all concerned to be an important element of California's milk regulation scheme. Further, the pricing and pooling laws themselves state expressly that their purpose is to ensure that milk with the state-mandated SNF content is readily available to Californians. *See* Cal. Food & Agr. Code § 61802(c) (determining that the pricing and pooling regulations are necessary to prevent economic disruption that could undermine the "standards of content and purity").

Accordingly, we conclude that California's milk pricing and pooling laws are also exempted from Commerce Clause challenge.

II. FOURTEENTH AMENDMENT

In its complaint, Shamrock generally invoked the Fourteenth Amendment and now alleges that California's milk-related laws are prohibited under both the Equal Protection and Due Process Clauses. Although it is not clear that Shamrock raised these two provisions of law specifically in the district court, because the arguments are purely legal in nature, we may consider them here.

In assessing whether the state's laws and regulations violate the Equal Protection Clause, we apply the rational basis test. *See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).* Shamrock contends that California has no legitimate interest in requiring milk to have a certain level of SNF or in establishing pricing and pooling laws. We do not agree. It is evident that the state's purposes in enacting both the milk composition standards and the pricing and pooling laws are legitimate. Specifically, California's milk laws and regulations further the state's interests in maintaining a stable and plentiful supply of wholesome milk. *See* Cal. Food & Agr. Code § § 61801, 61802. We have already recognized the legitimacy of these interests in *Country Classic Dairies, Inc. v. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988)* (upholding Montana's milk laws against an equal protection challenge).

Because California's interests in enacting the milk laws and regulations are legitimate, Shamrock must allege facts in the complaint to show that those laws and regulations are arbitrary or not rationally related to the state's goals in order to withstand the state's motion to dismiss. Even assuming that the facts alleged in the complaint are true, Shamrock has simply failed to set forth facts that would support an equal

protection violation. There is nothing in the complaint that so much as suggests that the milk laws are either arbitrary or unrelated to the state's efforts to ensure a plentiful supply of healthy milk for its citizens. It is insufficient to assert that the milk laws establish discriminatory classifications; the complaint must also allege facts to demonstrate that the classifications are arbitrary or that they are not rationally related to legitimate state interests.

Likewise, there is no merit to Shamrock's contention that a due process violation could be found under the facts alleged in the complaint. As with equal protection, rationality is the touchstone of due process analysis in cases of the type before us. Nothing in Shamrock's complaint suggests arbitrariness or a lack of rationality.

CONCLUSION

Congress has insulated California's milk laws against Commerce Clause challenges, and the district court therefore properly dismissed Shamrock's claims pursuant to Rule 12(b)(6). We also conclude that there is no merit to Shamrock's other constitutional challenges, and that dismissal as to these claims was appropriate as well.

Footnotes

[1] The saving clause provided as follows:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy *or deprive a State or State commission of its lawful authority now*

> *exercised* over the exportation of hydroelectric energy which is transmitted across a State line.

16 U.S.C. § 824(b)(1).

[2] The district court refused to look at legislative history because it determined that the statute was clear on its face. *See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992)* (admonishing courts to give effect to the plain meaning of statutes). Because the pricing and pooling laws are not specifically referenced in the statute, however, it is important to consider the legislative history here.

NO. CIV. S-96-889 LKK

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SHAMROCK FARMS COMPANY and SHAMROCK COMPANY, Plaintiffs,

v.

ANN M. VENEMAN, Secretary, Department of Food & Agriculture, State of California, et al., Defendants.

September 20, 1996, Decided

September 25, 1996, FILED

SUBSEQUENT HISTORY:

Reconsideration Denied February 25, 1997, Reported at: *1997 U.S. Dist. LEXIS 3029.*

DISPOSITION:
Motion to dismiss GRANTED; Status Conference set for September 23, 1996 VACATED.

COUNSEL:
For SHAMROCK FARMS CO, SHAMROCK FOODS CO, plaintiffs: John Anthony Mendez, DeCuir and Somach, Sacramento, CA. John H Vetne, PRO HAC VICE, Law Offices of John H Vetne, Newburyport, MA.

For ANN M VENEMAN, Secretary, Department of Food & Agriculture, State of California, RICHARD TATE, Chief, Milk and Dairy Foods Control Branch Division od Animal

Industry, Department of Food and Agriculture, State of California, defendants: Leonard R Stein, Steefel Levitt and Weiss, San Francisco, CA. Mark Joseph Urban, Attorney General's Office of the State of California, Sacramento, CA.

JUDGES:
LAWRENCE K. KARLTON, CHIEF JUDGE EMERITUS, UNITED STATES DISTRICT COURT

OPINION BY:
LAWRENCE K. KARLTON

OPINION:

ORDER

This case is before me on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Based upon the papers and pleadings on file herein, and oral argument heard by the court on September 3, 1996, the court disposes of the matter herein. See Local Rule 230(h).

I.

THE CASE

Plaintiffs are an Arizona dairy farm ("Shamrock Farms") and an Arizona milk processor ("Shamrock Foods") which distributes milk for sale in a number of western states, including California. Plaintiffs challenge California's standards for milkfat and solids-not-fat ("SNF") content of milk distributed in California, as well as California's pricing and pooling laws for milk bought from California farmers.

According to the complaint, the milk distributed by Shamrock Foods is subject to raw milk price and fluid milk identity regulation by the United States Department of Agriculture. Pursuant to section 401 of the Food Drug and Cosmetic Act, *21 U.S.C. § 341*, the Department of Health

and Human Services has adopted standards for milkfat and SNF content for milk sold in plaintiffs' geographic region. California has adopted different compositional standards for milk sold in California. Plaintiffs aver that processors must fortify their milk in order to bring it in compliance with California's standards. Plaintiffs also claim that they cannot sell their milk in California because they do not add milk powder or condensed milk to fortify, standardize or otherwise increase SNF content of the milk.

In addition, plaintiffs allege that the milk standards are "inextricably related to state milk pricing and pooling laws." See Complaint at P 28. In this regard, the complaint explains that California sets reduced prices for California milk with low SNF content, and then provides California milk processors with a fortification allowance to standardize their milk with wet or dry solids. According to plaintiffs, this provides California processors with a competitive advantage against out-of-state processors because California does not provide out-of-state processors with a fortification allowance.

On June 5, 1995, in a prior action brought by plaintiffs against the above-captioned defendants, Judge David F. Levi of this court ruled that the Nutritional Labeling and Education Act of 1990 ("NLEA") preempted California's compositional standards.[1] He ordered that "until such time as the FDA may issue an exemption from federal milk identity standards . . . California milk identity standards not identical to federal standards are preempted . . . ." On April 4, 1996, the president signed into law the Federal Agricultural Improvements and Reform Act of 1996 ("FAIRA").[2]

On April 26, 1996, defendants informed Shamrock Foods that all processing and marketing of milk within California would be subject to California standards whether or not it is produced and processed within the state. On May 3, 1996, plaintiffs filed this complaint for declaratory and injunctive relief on the basis that the milk standards, as construed and

applied by defendants, violate the Commerce Clause and the Fourteenth Amendment to the United States Constitution.

II.

DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. See *Cruz v. Beto, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972)* The court is bound to give the plaintiff the benefit of every reasonable inference that can be drawn from the "well-pleaded" allegations of the complaint. See *Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6, 83 S. Ct. 1461, 10 L. Ed. 2d 678 (1963).* Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See Id; see also *Wheeldin v. Wheeler, 373 U.S. 647, 648, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963)* (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. See *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).* So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)* (citing *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).* In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).*

III.

THE COMMERCE CLAUSE

It is well established that Congress can authorize a state to pass legislation burdening interstate commerce if it makes its intent to do so clear. *Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174, 86 L. Ed. 2d 112, 105 S. Ct. 2545 (1985)* ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to a constitutional attack under the Commerce Clause."); *W. & S. Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 652-53, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981)* ("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authority is rendered invulnerable to Commerce Clause challenge."); *White v. Mass. Council of Const. Employers, Inc., 460 U.S. 204, 213, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983)* ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."). Nonetheless, plaintiffs argue that Section 144 of the Agricultural Market Transition Act does not clearly allow California to regulate the composition of milk marketed in California. I cannot agree.

Section 144 clearly authorizes California to enforce its compositional standards for milk on out of state processors. First, the statute specifically refers to California and its ability to regulate the percentage of SNF in milk sold in California. Second, under the statute no provision of law shall preempt or otherwise limit California's ability to do so. Obviously the NLEA is a "provision of law," and thus, under the plain terms of section 144, NLEA no longer preempts the compositional standards for milk in California. Accordingly, California's enforcement of its standards relative to plaintiffs does not violate the Commerce Clause.

In addition to challenging the compositional standards, plaintiffs argue that the milk price and pooling laws -- in conjunction with the standards -- violate the Commerce Clause. Again, the court must reject plaintiffs' contention that Section 144 does not clearly provide California with the authority to impose its pricing and pooling laws upon out of state processors. Congress specifically provided California with the authority to regulate, "directly or indirectly," the compositional standards of milk marketed in California. Plaintiffs do not argue that the price and pooling scheme is not an indirect means for enforcing compositional standards, nor would such an argument be credible. Thus, whatever discriminatory effect on interstate commerce the pricing and pooling scheme might have, it does not violate the Commerce Clause because Congress has approved of it.

IV.

SEPARATION OF POWERS

Plaintiffs also maintain that the enactment of Section 144 violates the separation of powers doctrine. In this regard, they contend that section 144 cannot remove the preemptive force of NLEA because Congress cannot overturn Judge Levi's interpretation of the NLEA without amending the NLEA itself. This argument has no merit.

Congress can amend or repeal any law, even for the purpose of ending pending litigation. *State of Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855).* While the legislative branch cannot prescribe a rule of decision in a case pending before the courts, see *United States v. Sioux Nation of Indians, 448 U.S. 371, 405, 65 L. Ed. 2d 844, 100 S. Ct. 2716 (1980)* (citing *United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871)).* Congress can change the law at any time through superseding legislation so long as it does not direct the court how to interpret the law. See, e.g., *Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1434 (9th Cir. 1989).* Here, Congress has not

altered Judge Levi's interpretation of the NLEA; rather, Congress modified the NLEA after Judge Levi interpreted it.

Plaintiffs' reliance on *Seattle Audubon Society v. Robertson, 914 F.2d 1311 (9th Cir. 1990)*, in their separation of powers argument is unavailing. There, a temporary environmental law, the Northwest Timber Compromise, specifically provided that the defendants in two pending cases would not be in violation of the already existing requirements for the management of timber lands if they complied with the new requirements set forth in the Compromise. The Ninth Circuit held that the Compromise violated the separation of powers doctrine because it "directed the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Id at 1316.*

Reliance is unavailing first and foremost because the circuit's decision was reversed by the Supreme Court. See *Robertson v. Seattle Audubon Society, 503 U.S. 429, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992).* In doing so, the High Court explained that even though the law specifically made reference to pending cases, it did not abrogate the judiciary's role of determining whether defendants complied with the statute, either through compliance with the new requirements or through compliance with the old requirements. The Court concluded: "to the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases." *Id. at 440.*

As explained above, section 144 clearly modifies the NLEA. Moreover there can be no threat that the statute prescribes a rule of decision in a pending case because Judge Levi's case was disposed of on summary judgment. Indeed, the legislation is consistent with Judge Levi's observation that the NLEA would preempt California regulation until the FDA issued an exemption. In sum, Judge Levi's holding that NLEA preempted state compositional standards did not

prohibit Congress from enacting legislation which altered the NLEA's effect.

V.

EQUAL PROTECTION

Plaintiffs' Equal Protection argument fairs no better than their challenge under the Commerce Clause. Since California's regulation of milk standards and prices creates an economic classification, plaintiffs must allege that the milk standards and pricing scheme are not rationally related to a legitimate governmental interest in order to state an Equal Protection claim. *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).*

California's twin interests justifying its regulation are health and stabilization to the milk market. See Cal. Food & Agr. Code § § 61801, 61802.[3] These are legitimate interests for purposes of the Equal Protection Clause. *Country Classic Dairies, Inc. v. Milk Control Bureau, 847 F.2d 593, 596 (1988).* Thus, California does not run afoul of the Equal Protection Clause so long as the "legislature could rationally have decided" that its compositional and pricing standards might have furthered the health, safety and market stabilization goals for which it purportedly enacted the legislation. See Id. Plaintiffs do not allege that the statute is irrational, nor would such an allegation be well-taken. Thus, plaintiffs' Equal Protection challenge cannot lie.

VI.

ORDER

For all the above reasons, the court makes the following ORDERS:

1. Defendants' motion to dismiss is GRANTED; and

2. The Status Conference set for September 23, 1996, is VACATED.

IT IS SO ORDERED.

DATED: September 20, 1996.
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

Footnotes

[1] NLEA, § 403A(a) of the Federal Food Drug and Cosmetic Act, *21 U.S.C. § 343-1*(a). provides:

> **§ 343-1. National uniform nutrition labeling; preemption**
>
> (a) Except as provided in subsection (b), no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce --
>
> (1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 341(g) of this title.

[2] Title I of the Act, the Agricultural Market Transition Act, at section 144, provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:

> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat."
>
> 110 Stat. 888, 917 (1996), Pub. L. No. 104-127, Subtitle D, Chapter 1, § 144.

[3] On a motion to dismiss, the court may take judicial notice and consider the language and legislative history of a statute. See *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).*

NO. CIV. S-96-889 LKK/GGH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SHAMROCK FARMS COMPANY and SHAMROCK FOODS COMPANY, Plaintiffs,

v.

ANN M. VENEMAN, Secretary, Department of Food & Agriculture, State of California, et al., Defendants.

February 25, 1997, Decided

February 26, 1997, FILED

PRIOR HISTORY:

Original Opinion of September 20, 1996, Reported at: *1996 U.S. Dist. LEXIS 20653.*

DISPOSITION:
Plaintiff's motion for reconsideration DENIED.

COUNSEL:
For SHAMROCK FARMS CO, SHAMROCK FOODS CO, plaintiffs: John Anthony Mendez, DeCuir and Somach, Sacramento, CA. John H Vetne, PRO HAC VICE, Law Offices of John H Vetne, Newburyport, MA.

For ANN M VENEMAN, Secretary, Department of Food & Agriculture, State of California, RICHARD TATE, Chief, Milk and Dairy Foods Control Branch Division of Animal Industry, Department of Food and Agriculture, State of California, defendants: Leonard R Stein, Steefel Levitt and Weiss, San Francisco, CA. Mark Joseph Urban, Attorney General's Office of the State of California, Sacramento, CA.

JUDGES:
LAWRENCE K. KARLTON, CHIEF JUDGE EMERITUS, UNITED STATES DISTRICT COURT

OPINION BY:
LAWRENCE K. KARLTON

OPINION:

ORDER

Pending before the court is plaintiffs' motion to reconsider the court's dismissal of this action. For the reasons set forth below, the motion is denied.

I.

STANDARDS

"Under the 'law of the case' doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander, 106 F.3d 874, 97* Cal. Daily Op. Serv. 784, 97 D.A.R. 1151, *1997 WL 37294, *2* (9th Cir. 1997) (citing *Thomas v. Bible, 983 F.2d 152, 154* (9th Cir.), cert. denied, *508 U.S. 951, 124 L. Ed. 2d 661, 113 S. Ct. 2443 (1993)).* Although motions to reconsider are directed to the sound discretion of the court, see *Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986),* aff'd in part and rev'd in part on other grounds, *828 F.2d 514 (9th Cir. 1987),* cert. denied, *486 U.S. 1015 (1988),* considerations of judicial economy weigh heavily in the process. Thus, Local Rule 230(k) requires that a party seeking reconsideration of a district court's order must brief the "new or different facts or circumstances [which]

were not shown upon such prior motion, or what other grounds exist for the motion." Generally speaking, before reconsideration may be granted there must be a change in the controlling law, facts or other circumstances, the need to correct a clear error, or the need to prevent manifest injustice. *Alexander, supra,* at *2.

As with motions to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59(a), motions to reconsider are not vehicles permitting the unsuccessful party to "rehash" arguments previously presented, see *Costello v. United States Government, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991).* Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. *Fay Corp. v. BAT Holdings One, Inc., 651 F. Supp. 307, 309 (W.D. Wash. 1987),* aff'd, *896 F.2d 1227 (9th Cir. 1990).* Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. Id. These relatively restrictive standards "reflect[] district courts' concern for preserving dwindling resources and promoting judicial efficiency." *Costello, 765 F. Supp. at 1009.*

Below, the court considers the arguments tendered by plaintiffs in support of their motion to reconsider. In doing so, the court notes that at times it is difficult to discern whether plaintiffs are merely tendering the same arguments which the court has rejected, thereby failing to meet the standards of Local Rule 230(k), whether they are tendering different arguments which were available to them prior to the court's resolution of the case, thereby simply "shifting grounds" in violation of the principles of judicial economy, or whether they are presenting arguments that were available to them, but were withheld for reasons which do not justify the conduct.[1]

II.

THE FOURTEENTH AMENDMENT

A. EQUAL PROTECTION VERSUS DUE PROCESS

Plaintiffs' complaint does not invoke the Due Process Clause but rather specifically alleges that the California milk scheme which it attacks violates the Equal Protection Clause. See Introductory Statement. Moreover, in response to the defendants' motion to dismiss, plaintiffs did not raise a due process claim. Now, however, plaintiffs cite cases which arose under the Due Process Clause. It is unclear whether plaintiffs are actually seeking to make a due process argument or whether these citations simply constitute imprecise analysis. Either way, it would appear inappropriate to consider a due process claim at this late stage. Accordingly, the court will analyze the Fourteenth Amendment claim on an equal protection basis only.

B. LEVEL OF REVIEW

Although plaintiffs imply otherwise, the Ninth Circuit has specifically held that state laws which regulate the milk industry comply with the Equal Protection Clause so long as they satisfy the rational basis test. *Country Classic Dairies v. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988)* (milk pricing laws). In Country Classic Dairies, the court observed that such "regulation amounts to local economic regulation; this court may 'presume the constitutionality of . . . discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" Id. (quoting *New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)* (per curiam)). Thus, the issues here are scrutinized under the rational basis test.[2]

A statute passes the rational basis test so long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637*

(1993) (citations omitted). The Supreme Court has explained that a statutory classification fails rational basis review only when it "rests on grounds wholly irrelevant to the achievement of the state's objective." *Id. at 324* (citations and internal quotations omitted). Indeed, if it is possible to "reasonably conceive [a] state of facts" the statute addresses, the statute will pass constitutional muster. Id.[3]

In its original order, the court found that the statute satisfied the rational basis test premised upon both nutritional and price stabilization bases. The plaintiffs seeks reconsideration asserting that neither basis represented the "true motive of the California legislature, and that the scheme does not serve either purpose very well." As I now explain, neither premise suffices to undermine the court's confidence in its previous order.

The first ground fails because the issue of the legislature's "true motive" in this context is not a factual issue, and thus is not subject to a factual challenge.[4] As the Supreme Court has explained, a classification withstands equal protection attack "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller, 509 U.S. at 320* (emphasis added) (citations omitted). The legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn, 505 U.S. 1, 15, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992)* (citations omitted). Rather, a statute withstands an "equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Comm., Inc., 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)* (citations omitted). Indeed, the High Court has specifically held in a First Amendment context that the state is not precluded from advancing "interests . . . concededly . . . not asserted when the prohibition was enacted into law." *Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983).*

This treatment of the legislative purpose served by a statute as a legal rather than factual question completely undermines plaintiffs' efforts to introduce evidence suggesting less worthy motives attributable to the adoption by California of the statutes in issue. In sum, where a statute does not involve fundamental rights or suspect classifications, it is presumed constitutional and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Heller, 509 U.S. at 320* (quoting *Lennhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973)).*

Plaintiffs' second ground for attacking the court's finding that the statute satisfies the Equal Protection Clause is equally unpersuasive. "A state, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" Id. at 320 (quoting *Beach Communications, 508 U.S. at 315).* The Supreme Court has explained that we "are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends . . . 'the problems of government are practical ones and may justify, if they do not require, rough accommodations *Id. at 320* (quoting *Dandridge v. Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)).* In this very context, the Ninth Circuit has explained that a hypothesized rational basis existed for the statutes in question and concluded that it was not the role of the court to decide whether the regulation could in fact achieve the hypothetical objective. *Country Classic, 847 F.2d at 596.*[5] Thus, plaintiffs' claim that the regulation does not effectively further the purported intent of Congress is of no avail.

III.

COMMERCIAL SPEECH

In their motion to reconsider, the plaintiffs raise for the first time an argument that California's milk regulating statutes limit their commercial speech in violation of the First Amendment. For the reasons cited above in the standards section, this argument cannot be considered.[6]

The court will pause only long enough to note that the laws under attack do not prohibit speech, but rather, the marketing of certain types of milk no matter what words the distributors wish to place on the cartons. Plaintiffs' complaint is that the California regulatory scheme in effect renders it impossible for them to market their product in California in the first place. Under these circumstances, what labels they might choose to put upon their cartons if they could market their product is an issue which is, to say the least, not ripe for decision.

IV.

THE COMMERCE CLAUSE

The plaintiffs, citing extensive legislative history not referred to in their original papers, seek to demonstrate that Congress did not clearly intend the Farm Bill to preempt the NLEA. These arguments cannot prevail. Before the court can consider this legislative history, plaintiffs must raise an ambiguity in the text of the statute itself. *Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992).* The court previously explained how the Farm Bill amended NLEA, see Order, filed September 25, 1996, at 7-9. For the reasons stated therein, the statute clearly exempts the California regulatory scheme from the NLEA's provisions, and resort to the legislative history is unnecessary and thus inappropriate.

The plaintiffs' second prong of this attack is that, even assuming that Congress clearly and unambiguously exempted

California from the reach of the NLEA, it did not exempt California from the limitations of the dormant Commerce Clause. See *United Egg Producers v. Dept. of Agriculture, 77 F.3d 567 (1st Cir. 1996)* (holding the statute considered therein only permitted such regulation not violating the dormant Commerce Clause); see also *Wyoming v. Oklahoma, 502 U.S. 437, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992)* (statute simply saves from preemption under the Federal Power Act such state authority as was otherwise lawful). Obviously, the effect of the dormant Commerce Clause turns on the terms of the statute under review. As I now explain, it appears to this court that the Farm Bill clearly exempts California from the strictures of that clause.

Section 144 of the Farm Act provides that "nothing in this Act or any other provision of law shall be construed to preempt . . ." California from directly or indirectly regulating the compositional and labeling standards of milk. Thus, the question becomes whether "any other provision of law" specifies with sufficient clarity that California is exempted from the effects of the dormant Commerce Clause. As I now explain, the language Congress employed expressed its intent with complete clarity and the plaintiffs have failed to explain why the court should believe otherwise.

The issue is one of statutory construction, albeit one burdened with a special requirement of clarity. As with any such issue, resolution of the question of whether the phrase "and other provision of law" includes constitutional adjudication requires as a first inquiry whether the phrase has been authoritatively construed. See, e.g., *United States v. Hubbard, 856 F. Supp. 1416, 1418 (E.D. Cal. 1994).* Since it appears that neither the Supreme Court nor the Ninth Circuit has spoken to the subject, the issue becomes one of examination of the terms employed by Congress.

The court believes that the issue plainly resolves against plaintiff whether viewed as a matter of ordinary speech, see

Mills Music Inc. v. Snyder, 469 U.S. 153, 164, 83 L. Ed. 2d 556, 105 S. Ct. 638 (1985) ("it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose'") (citations omitted), or as a term of art, see *Moskal v. United States, 498 U.S. 103, 121, 112 L. Ed. 2d 449, 111 S. Ct. 461 (1990)* (Scalia J., dissenting) ("when a statute employs a term with a specialized legal meaning . . . that meaning governs").

Both as a matter of ordinary usage, see Webster's Third Unabridged International Dictionary (1976), p. 1279,[7] and as a term of art, see Black's Law Dictionary (6th ed. 1990), p. 884,[8] the word "law" includes reference to binding judicial decisions. The word "provision" in the phrase engenders no ambiguity since it simply means "the act or process of providing," see Webster's, supra, at p. 1827, for which on the same page the dictionary gives as a synonym "supply." Thus, the phrase means, inter alia, the supplying of a rule by virtue of binding judicial decision. In sum, for the purposes here considered, the phrase "provision of law" includes the Supreme Court's decisions defining the operation of the dormant Commerce Clause. It appears to the court that the language employed by Congress in the Farm Bill was as expansive and inclusive as it could find, and there appears to be no reason, other than the enthusiasm of plaintiffs' advocacy, to depart from that conclusion.

V.

ORDER

For all the above reasons, plaintiffs' motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED: February 25, 1997.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS

UNITED STATES DISTRICT COURT

Footnotes

[1] It appears that plaintiffs simply believe that the court is in error. Of course, such a conviction is an insufficient basis for a motion to reconsider, but rather properly forms the basis for an appeal. As explained in the text, mere error is an insufficient basis for reconsideration and the previous decision must either be clearly erroneous or result in extreme injustice. Whatever else might be true of the court's previous order, even if it is in error, that error is hardly clear, nor has plaintiff demonstrated any basis for suggesting extreme injustice.

[2] Defendants claim that there is no classification because the standards apply equally to all milk producers and distributors. That claim appears to miss the point that every statute by addressing a subject matter distinguishes that subject from all other instances of the same class. Thus, the statute at bar, by regulating milk, distinguishes that product from other foods. The court need not address the issue at length, however, since I conclude that the California milk scheme passes constitutional muster under the rational basis test.

[3] The court wishes to be clear. Its recitation and application of the rational basis test for resolutions of claims arising under the Equal Protection Clause where there is neither a fundamental right nor a suspect class in issue is not an endorsement of those standards, but simply an acknowledgment of my duty as a subordinate court.

[4] As I have previously observed "of course to speak of legislative motive as contrasted with legislative intent, is to speak in terms of a literary device. While members of the legislative body have minds, the legislative body itself does not. Thus, to speak of 'legislative motivation' is to speak in terms of a seductive metaphor. 'Legislative intent,' on the

other hand, describes a legal term of art. It addresses the court's duty to determine what the legislative body provided for in the statute." *Service Employees Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580, 585 n. 8 (E.D. Cal. 1990)*, aff'd, *955 F.2d 1312 (9th Cir. 1992)*, cert. denied, *505 U.S. 1230, 120 L. Ed. 2d 922, 112 S. Ct. 3056, 112 S. Ct. 3057 (1992)*.

[5] Given these conclusions, the court will resist the temptation of demonstrating that plaintiffs' own evidence suggests the existence of a rational basis for the statute. See Appendix, Tab 7 and Tab 15.

[6] Plaintiffs fail to demonstrate new or intervening facts or law, and fail to explain why the argument is raised for the first time on a motion to reconsider. Given that the local rules of this court have the force of law, *Professional Progress Group v. Dept. of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994)*, there is simply no basis for this court to address this issue.

[7] "a rule . . . that is prescribed . . . as binding by a supreme controlling authority . . . (as a . . . judicial decision)."

[8] "a body of rules of action or conduct prescribed by controlling authority and having binding legal force."

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U.S. COURT OF APPEALS

No. 99-16981, No. 99-16982

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PONDEROSA DAIRY,
Plaintiff-Appellant,

v.

WILLIAM J. LYONS, JR., * Secretary, Department of Food & Agriculture, State of California, and A.J. YATES, Deputy Secretary, Department of Food & Agriculture, State of California,
Defendants-Appellees.

HILLSIDE DAIRY INC., A&A DAIRY, INC., a Nevada S Corporation, MILKY WAY FARM, INC., a Nevada S Corporation, and, L&S DAIRY, INC., a Nevada S Corporation,
Plaintiffs-Appellants,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and A.J. YATES, Deputy Secretary, Department of Food & Agriculture, State of California,
Defendants-Appellees.

Before SNEED and SILVERMAN, Circuit Judges and SEDWICK, District Judge[1]

The panel has voted to deny the petition for rehearing. Judge Silverman has voted to reject the petition for rehearing en banc and Judges Sneed and Sedwick so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35.

The petition for rehearing and rehearing en banc are denied.

Footnote

[1] The Honorable John E. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

RELEVANT STATUTES INVOLVED

U.S. Constitution, Article I, Section 8

The Congress shall have power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

Excerpts from Federal Agriculture Improvement Act of 1996, Pub. L. No. 104-127, §§141-152, 110 Stat. 914-930 (Apr. 4, 1996).

Title I, Subtitle D, Chapter 1 – Dairy

CHAPTER 1--DAIRY
SEC. 141. MILK PRICE SUPPORT PROGRAM [7 U.S.C. §7251].

(a) SUPPORT ACTIVITIES- The Secretary of Agriculture shall support the price of milk produced in the 48 contiguous States through the purchase of cheese, butter, and nonfat dry milk produced from the milk.

(b) RATE- The price of milk shall be supported at the following rates per hundredweight for milk containing 3.67 percent butterfat:

(1) During calendar year 1996, $10.35.

(2) During calendar year 1997, $10.20.

(3) During calendar year 1998, $10.05.

(4) During calendar year 1999, $9.90.

(c) PURCHASE PRICES- The support purchase prices under this section for each of the products of milk (butter, cheese, and nonfat dry milk) announced by the Secretary shall be the same for all of that product sold by persons offering to sell the product to the Secretary. The purchase prices shall be sufficient to enable plants of average efficiency to pay producers, on average, a price that is not less than the rate of price support for milk in effect under subsection (b) of this section.

(d) Special rule for butter and nonfat dry milk purchase prices

(1) Allocation of purchase prices

The Secretary may allocate the rate of price support between the purchase prices for nonfat dry milk and butter in a manner that will result in the lowest level of expenditures by the Commodity Credit Corporation or achieve such other objectives as the Secretary considers appropriate. Not later than 10 days after making or changing an allocation, the Secretary shall notify the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate of the allocation. Section 553 of title 5 shall not apply with respect to the implementation of this section.

(2) Timing of purchase price adjustments

The Secretary may make any such adjustments in the purchase prices for nonfat dry milk and butter the Secretary considers to be necessary not more than twice in each calendar year.

(e) Refunds of 1995 and 1996 assessments

(1) Refund required

The Secretary shall provide for a refund of the entire reduction required under section 204(h)(2) of the Agricultural Act of 1949 (7 U.S.C. 1446e(h)(2)), as in effect on the day before the amendment made by subsection (g) of this section, in the price of milk received by a producer during calendar year 1995 or 1996, if the producer provides evidence that the producer did not increase marketings in calendar year 1995 or 1996 when compared to calendar year 1994 or 1995, respectively.

(2) Exception

This subsection shall not apply with respect to a producer for a particular calendar year if the producer has already received a refund under section 204(h) of the Agricultural Act of 1949 for the same fiscal year before the effective date of this section.

(3) Treatment of refund

A refund under this subsection shall not be considered as any type of price support or payment for purposes of sections 3811 and 3821 of title 16.

(f) Commodity Credit Corporation

The Secretary shall carry out the program authorized by this section through the Commodity Credit Corporation.

(g) Omitted

(h) Period of effectiveness

This section (other than subsection (g) of this section) shall be effective only during the period beginning on the first day of the first month beginning after April 4, 1996, and ending on December 31, 2001. The program authorized by this section shall terminate on December 31, 2001, and shall be considered to have expired notwithstanding section 907 of title 2.

SEC. 142. RECOURSE LOAN PROGRAM FOR COMMERCIAL PROCESSORS OF DAIRY PRODUCTS [7 U.S.C. §7252].

(a) RECOURSE LOANS AVAILABLE- Under such reasonable terms and conditions as the Secretary may prescribe, the Secretary shall make recourse loans available to commercial processors of eligible dairy products to assist the processors to manage inventories of eligible dairy products and assure a greater degree of price stability for the dairy industry during the year. The Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to carry out this section.

(b) Amount of loan

The Secretary shall establish the amount of a loan for eligible dairy products, which shall reflect a milk equivalent value of $9.90 per hundredweight of milk containing 3.67 percent butterfat.

The rate of interest charged participants under this section shall not be less than the rate of interest charged the Commodity Credit

Corporation by the United States Treasury.

(c) Period of loan

The original term of a recourse loan made under this section may not extend beyond the end of the fiscal year in which the loan is made. At the end of the fiscal year, the Secretary may extend the loan for an additional period not to exceed the end of the next fiscal year.

(d) "Eligible dairy products" defined

In this section, the term "eligible dairy products" means cheddar cheese, butter, and nonfat dry milk.

(e) Effective date

This section shall be effective beginning January 1, 2002.

SEC. 143. CONSOLIDATION AND REFORM OF FEDERAL MILK MARKETING ORDERS [7 U.S.C. §7253].

(a) AMENDMENT OF ORDERS-

(1) REQUIRED CONSOLIDATION- The Secretary shall amend Federal milk marketing orders issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

(2) INCLUSION OF CALIFORNIA AS SEPARATE ORDER- Upon the petition and approval of California dairy producers in the manner provided in section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, the Secretary shall designate the State of California as a separate Federal milk marketing order. The order

covering California shall have the right to reblend and distribute order receipts to recognize quota value.

(3) RELATED ISSUES ADDRESSED IN CONSOLIDATION- Among the issues the Secretary is authorized to implement as part of the consolidation of Federal milk marketing orders are the following:

(A) The use of utilization rates and multiple basing points for the pricing of fluid milk.

(B) The use of uniform multiple component pricing when developing 1 or more basic formula prices for manufacturing milk.

(4) EFFECT OF EXISTING LAW- In implementing the consolidation of Federal milk marketing orders and related reforms under this subsection, the Secretary may not consider, or base any decision on, the table contained in section 8c(5)(A) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)(A)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, as added by section 131 of the Food Security Act of 1985.

(b) EXPEDITED PROCESS-

(1) USE OF INFORMAL RULEMAKING- To implement the consolidation of Federal milk marketing orders and related reforms under subsection (a), the Secretary shall use the notice and comment procedures provided in section 553 of title 5, United States Code.

(2) TIME LIMITATIONS-

(A) PROPOSED AMENDMENTS- The Secretary shall announce the proposed amendments to be made under

subsection (a) not later than 2 years after the date of enactment of this title.

(B) FINAL AMENDMENTS- The Secretary shall implement the amendments not later than 3 years after the date of enactment of this title.

(3) EFFECT OF COURT ORDER- The actions authorized by this subsection are intended to ensure the timely publication and implementation of new and amended Federal milk marketing orders. In the event that the Secretary is enjoined or otherwise restrained by a court order from publishing or implementing the consolidation and related reforms under subsection (a), the length of time for which that injunction or other restraining order is effective shall be added to the time limitations specified in paragraph (2) thereby extending those time limitations by a period of time equal to the period of time for which the injunction or other restraining order is effective.

(c) FAILURE TO TIMELY CONSOLIDATE ORDERS- If the Secretary fails to implement the consolidation required under subsection (a)(1) within the time period required under subsection (b)(2)(B) (plus any additional period provided under subsection (b)(3)), the Secretary may not assess or collect assessments from milk producers or handlers under such section 8c for marketing order administration and services provided under such section after the end of that period until the consolidation is completed. The Secretary may not reduce the level of services provided under the section on account of the prohibition against assessments, but shall rather cover the cost of marketing order administration and services through funds available for the Agricultural Marketing Service of the Department.

(d) REPORT REGARDING FURTHER REFORMS-

(1) REPORT REQUIRED- Not later than April 1, 1997, the Secretary shall submit to Congress a report--

(A) reviewing the Federal milk marketing order system established pursuant to section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, in light of the reforms required by subsection (a);

(B) describing the efforts underway and the progress made in implementing the reforms required by subsection (a); and

(C) containing such recommendations as the Secretary considers appropriate for further improvements and reforms to the Federal milk marketing order system.

(2) EFFECT OF OTHER LAWS- Any limitation imposed by Act of Congress on the conduct or completion of reports to Congress shall not apply to the report required under this section, unless the limitation specifically refers to this section.

SEC. 144. EFFECT ON FLUID MILK STANDARDS IN STATE OF CALIFORNIA. [7 U.S.C. §7254].

Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding--

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

SEC. 145. MILK MANUFACTURING MARKETING ADJUSTMENT [7 U.S.C. §7255].

(a) MAXIMUM ALLOWANCES ESTABLISHED- No State shall provide for a manufacturing allowance for the processing of milk in excess of--

(1) $1.65 per hundredweight of milk for milk manufactured into butter and nonfat dry milk; and

(2) $1.80 per hundredweight of milk for milk manufactured into cheese.

(b) MANUFACTURING ALLOWANCE DEFINED- In this section, the term `manufacturing allowance' means--

(1) the amount by which the product price value of butter and nonfat dry milk manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce those products; or

(2) the amount by which the product price value of cheese manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce cheese.

(c) EFFECT OF VIOLATION- If the Secretary determines following a hearing that a State has in effect a manufacturing allowance that exceeds the manufacturing allowance authorized in subsection (a), the Secretary shall

suspend purchases of cheddar cheese, butter, and nonfat dry milk produced in that State until such time as the State complies with such subsection.

(d) EFFECTIVE DATE; IMPLEMENTATION- This section (other than subsection (e)) shall be effective during the period beginning on the first day of the first month beginning after the date of enactment of this title and ending on December 31, 1999. During that period, the Secretary may exercise the authority provided to the Secretary under this section without regard to the issuance of regulations intended to carry out this section.

(e) CONFORMING REPEAL- Effective on the first day of the first month beginning after the date of enactment of this title, section 102 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 1446e-1) is repealed.

SEC. 146. PROMOTION.

(a) CONGRESSIONAL PURPOSE- Section 1999B(a) of the Fluid Milk Promotion Act of 1990 (7 U.S.C. 6401(a)) is amended--

(1) by redesignating paragraphs (6), (7) and (8) as paragraphs (7), (8) and (9), respectively; and

(2) by inserting after paragraph (5) the following:

"(6) the congressional purpose underlying this subtitle is to maintain and expand markets for fluid milk products, not to maintain or expand any processor's share of those markets and that the subtitle does not prohibit or restrict individual advertising or promotion of fluid milk products since the programs created and funded by this subtitle are not extended to replace individual advertising and promotion efforts;"

(b) CONGRESSIONAL POLICY-Section 1999B(b) of the Fluid Milk Promotion Act of 1990 (7 U.S.C. 6401(b)) is amended to read as follows:

"(b) POLICY-It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of powers provided in this subtitle, of an orderly procedure for developing, financing, through adequate assessments on fluid milk product produced in the United States and carrying out an effective, continuous, and coordinated program of promotion, research, and consumer information designed to strengthen the position of the dairy industry in the marketplace and maintain and expand domestic and foreign markets and uses for fluid milk products, the purpose of which is not to compete with or replace individual advertising or promotion efforts designed to promote individual brand name or trade name fluid milk products, but rather to maintain and expand the markets for all fluid milk products, with the goal and purpose of this subtitle being a national governmental goal that authorizes and funds programs that result in government speech promoting government objectives.".

(c) RESEARCH-Section 1999C(6) of the Fluid Milk Promotion Act of 1990 (7 U.S.C. 6402(6)) is amended to read as follows:

"(6) RESEARCH- The term 'research' means market research to support advertising and promotion efforts, including educational activities, research directed to product characteristics product development, including new products or improved technology in production, manufacturing or processing of milk and the products of milk.".

(d) VOTING-

(1) INITIAL REFERENDA-Section 1999N(b)(2) of the Fluid Milk Promotion Act of 1990 (7 U.S.C. 6413(b)(2)) is amended by striking "all processors" and inserting "fluid milk processors voting in the referendum".

(2) SUSPENSION OR TERMINATION-Section 1999O(c) of such Act (7 U.S.C. 6414(c)) is amended-

(A) in paragraph (1), by striking "all processors" and inserting "fluid milk processors voting in the preceding referendum"; and

(B) in paragraph (2)(B), by striking "all processors" and inserting "fluid milk processors voting in the referendum".

(e) DURATION-Section 1999O(a) of the Fluid Milk Promotion Act of 1990 (7 U.S.C. 6414(a)) is amended by striking "1996" and inserting "2002".

SEC. 147. NORTHEAST INTERSTATE DAIRY COMPACT [7 U.S.C. §7256].

Congress hereby consents to the Northeast Interstate Dairy Compact entered into among the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont as specified in section 1(b) Senate Joint Resolution 28 of the 104th Congress, as placed on the calendar of the Senate, subject to the following conditions:

(1) FINDING OF COMPELLING PUBLIC INTEREST- Based upon a finding by the Secretary of a compelling public interest in the Compact region, the Secretary may grant the States that have ratified the Northeast Interstate Dairy Compact, as of the date of enactment of this title, the authority to implement the Northeast Interstate Dairy Compact.

(2) LIMITATION ON MANUFACTURING PRICE- The Northeast Interstate Dairy Compact Commission shall not regulate Class II, Class III, orClass III-A milk used for manufacturing purposes or any other milk, other than Class I (fluid) milk, as defined by a Federal milk marketing order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c) reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

(3) DURATION- Consent for the Northeast Interstate Dairy Compact shall terminate concurrent with the Secretary's implementation of the dairy pricing and Federal

milk marketing order consolidation and reforms under section 143.

(4) ADDITIONAL STATES- Delaware, New Jersey, New York, Pennsylvania, Maryland, and Virginia are the only additional States that may join the Northeast Interstate Dairy Compact, individually or otherwise, if upon entry the State is contiguous to a participating State and if Congress consents to the entry of the State into the Compact after the date of enactment of this title.

(5) COMPENSATION OF COMMODITY CREDIT CORPORATION- Before the end of each fiscal year that a Compact price regulation is in effect, the Northeast Interstate Dairy Compact Commission shall compensate the Commodity Credit Corporation for the cost of any purchases of milk and milk products by the Corporation that result from the projected rate of increase in milk production for the fiscal year within the Compact region in excess of the projected national average rate of the increase in milk production, as determined by the Secretary.

(6) MILK MARKETING ORDER ADMINISTRATOR- At the request of the Northeast Interstate Dairy Compact Commission, the Administrator of the applicable Federal milk marketing order issued under section 8(c)5 of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, shall provide technical assistance to the Compact Commission and be compensated for that assistance.

(6) MILK MARKETING ORDER ADMINISTRATOR- At the request of the Northeast Interstate Dairy Compact Commission, the Administrator of the applicable Federal milk marketing order issued under

section 8(c)5 of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, shall provide technical assistance to the Compact Commission and be compensated for that assistance.

(7) FURTHER CONDITIONS- The Northeast Interstate Dairy Compact Commission shall not prohibit or in any way limit the marketing in the Compact region of any milk or milk product produced in any other production area in the United States. The Compact Commission shall respect and abide by the ongoing procedures between Federal milk marketing orders with respect to the sharing of proceeds from sales within the Compact region of bulk milk, packaged milk, or producer milk originating from outside of the Compact region. The Compact Commission shall not use compensatory payments under section 10(6) of the Compact as a barrier to the entry of milk into the Compact region or for any other purpose. Establishment of Compact over-order price, in itself, shall not be considered a compensatory payment or a limitation or prohibition on the marketing of milk.

SEC. 148. DAIRY EXPORT INCENTIVE PROGRAM

(a) DURATION- Section 153(a) of the Food Security Act of 1985 (15 U.S.C. 713a-14(a)) is amended by striking `2001' and inserting `2002'.

(b) SOLE DISCRETION- Section 153(b) of the Food Security Act of 1985 (15 U.S.C. 713a-14(b)) is amended by inserting `sole' before `discretion'.

(c) ELEMENTS OF PROGRAM- Section 153(c) of the Food Security Act of 1985 (15 U.S.C. 713a-14(c)) is amended--

(1) by striking `and' at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting a semicolon; and

(3) by adding at the end the following:

`(3) the maximum volume of dairy product exports allowable consistent with the obligations of the United States as a member of the World Trade Organization is exported under the program each year (minus the volume sold under section 1163 of the Food Security Act of 1985 (Public Law 99-198; 7 U.S.C. 1731 note) during that year), except to the extent that the export of such a volume under the program would, in the judgment of the Secretary, exceed the limitations on the value set forth in subsection (f); and

`(4) payments may be made under the program for exports to any destination in the world for the purpose of market development, except a destination in a country with respect to which shipments from the United States are otherwise restricted by law.'.

(d) MARKET DEVELOPMENT- Section 153(e)(1) of the Food Security Act of 1985 (15 U.S.C. 713a-14(e)(1)) is amended--

(1) by striking `and' and inserting `the'; and

(2) by inserting before the period the following: `, and any additional amount that may be required to assist in the development of world markets for United States dairy products'.

(e) MAXIMUM ALLOWABLE AMOUNTS- Section 153 of the Food Security Act of 1985 (15 U.S.C. 713a-14) is amended by adding at the end the following:

`(f) Required Funding-

`(1) IN GENERAL- Except as provided in paragraph (2), the Commodity Credit Corporation shall in each year use money and commodities for the program under this section in the maximum amount consistent with the obligations of the United States as a member of the World Trade Organization, minus the amount expended under section 1163 of the Food Security Act of 1985 (Public Law 99-198; 7 U.S.C. 1731 note) during that year.

`(2) VOLUME LIMITATIONS- The Commodity Credit Corporation may not exceed the limitations specified in subsection (c)(3) on the volume of allowable dairy product exports.'.

SEC. 149. AUTHORITY TO ASSIST IN ESTABLISHMENT AND MAINTENANCE OF ONE OR MORE EXPORT TRADING COMPANIES [7 U.S.C. §7257].

The Secretary of Agriculture shall, consistent with the obligations of the United States as a member of the World Trade Organization, provide such advice and assistance to the United States dairy industry as may be necessary to enable that industry to establish and maintain one or more export trading companies under the Export Trading Company Act of 1982 (15 U.S.C. 4001 et seq.) for the purpose of facilitating the international market development for and exportation of dairy products produced in the United States.

SEC. 150. STANDBY AUTHORITY TO INDICATE ENTITY BEST SUITED TO PROVIDE INTERNATIONAL MARKET DEVELOPMENT AND EXPORT SERVICES [7 U.S.C. §7258].

(a) Indication of entity best suited to assist international market development for and export of United States dairy products

The Secretary of Agriculture shall indicate which entity or entities autonomous of the Government of the United States, which seeks such a designation, is best suited to facilitate the international market development for and exportation of United States dairy products, if the Secretary determines that -

(1) the United States dairy industry has not established an export trading company under the Export Trading Company Act of 1982 (15 U.S.C. 4001 et seq.) for the purpose of facilitating the international market development for an exportation of dairy products produced in the United States on or before June 30, 1997; or

(2) the quantity of exports of United States dairy products during the 12-month period preceding July 1, 1998 does not exceed the quantity of exports of United States dairy products during the 12-month period preceding July 1, 1997 by 1.5 billion pounds (milk equivalent, total solids basis).

(b) Funding of export activities

The Secretary shall assist the entity or entities identified under subsection (a) of this section in identifying sources of funding for the activities specified in subsection (a) of this section from within the dairy industry and elsewhere.

(c) Application of section

This section shall apply only during the period beginning on July 1, 1997 and ending on September 30, 2000.

SEC. 151. STUDY AND REPORT REGARDING POTENTIAL IMPACT OF URUGUAY ROUND ON PRICES, INCOME, AND GOVERNMENT PURCHASES [7 U.S.C. §7259].

(a) STUDY- The Secretary of Agriculture shall conduct a study, on a variety by variety of cheese basis, to determine the potential impact on milk prices in the United States, dairy

producer income, and Federal dairy program costs, of the allocation of additional cheese granted access to the United States as a result of the obligations of the United States as a member of the World Trade Organization.

(b) Report

Not later than June 30, 1997, the Secretary shall report to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives the results of the study conducted under this section.

(c) Rule of construction

Any limitation imposed by Act of Congress on the conduct or completion of studies or reports to Congress shall not apply to the study and report required under this section, unless the limitation specifically refers to this section.

SEC. 152. PROMOTION OF UNITED STATES DAIRY PRODUCTS IN INTERNATIONAL MARKETS THROUGH DAIRY PROMOTION PROGRAM.

Section 113(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4504(e)) is amended by adding at the end the following new sentence: "For each of fiscal years 1997 through 2001, the Board's budget may provide for the expenditure of revenues available to the Board to develop international markets for, and to promote within such markets, the consumption of dairy products produced in the United States from milk produced in the United States."

STATE OF CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE MILK POOLING BRANCH POOLING PLAN FOR MARKET MILK AS AMENDED EFFECTIVE SEPTEMBER 1, 2001 BY ORDER NUMBER NINTY-NINE (99)

(Available in full at http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf)

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE POOLING PLAN FOR MARKET MILK, AS AMENDED

Article 1. Definitions

Section 100. The definitions contained in Chapter 2 and Chapter 3, Part 3, Division 21 of the Food and Agricultural Code govern the construction of this Plan.

Section 101. " Act " shall be known and may be cited as the " Food and Agricultural Code ".

Section 102. " Person " means any individual, firm, corporation, partnership, trust, incorporated or unincorporated association, nonprofit cooperative association, nonprofit cooperative marketing association, nonprofit corporation, or any other business unit or organization.

Section 103. " Secretary " means the Secretary of the California Department of Food and Agriculture or any employee of such department duly assigned or delegated to perform the functions required pursuant to this Plan.

Section 104. " Producer " means any person that produces market milk in the State of California from five or more cows.

Section 115. " Quota milk " means that amount of fat and solids not fat contained in pool milk delivered by a producer during the month which is not in excess of the pool quota of such producer computed pursuant to Section 110 multiplied by the number of quota eligible days in the month.

Section 115.5 " Quota eligible days " means the number of calendar days in the month as reduced by the following:

(a) The number of days on which a producer (including producer members or patrons of cooperative associations) is degraded as defined in Section 113.3 in accordance with procedures established by an appropriate public regulatory or health authority;

(b) The number of days, on which the secretary agrees, a producer's milk did not meet the quality requirements specified in the producer's contract with the handler and such milk was not sold or used for Class 1 purposes and was otherwise handled in accordance with Section 62715 of the Food and Agricultural Code.

Section 116. " Daily production milk " or " daily base milk " means that amount of pool milk delivered by a producer during the month which is in excess of the pool quota computed pursuant to Section 110 of such producer but not in excess of the production base computed pursuant to Section 108.

Section 116.5 " Production milk " or " base milk " means that amount of pool milk delivered by a producer during the month which is equal to the monthly production base as computed pursuant to Section 108.5, less the amount of quota milk delivered during the month as computed pursuant to Section 115.

Section 117. " Overproduction milk " or " overbase milk " means that amount of pool milk delivered by a producer during the month, exclusive of milk degraded in accordance

Article 2. Eligibility for a Production Base and Pool Quota

Section 200. The secretary shall compute and establish a production base and pool quota for each producer who produced market milk which was delivered to a plant regulated under one or more of the Stabilization and Marketing Plans effective in the pool area specified in Section 118, during any base period, subject to the following requirements:

(a) If a producer operated more than one dairy farm holding valid market milk permits during any base period, or during the months of December 1966 and January and February 1967 for producers whose production base is computed under Paragraph 108(c) a separate production base and pool quota shall be computed, for deliveries from each such dairy farm. If such farms were not operated separately for the entire base period selected, they shall be combined for computing base and quota;

(b) Only one production base and one pool quota shall be computed for a single production unit which was jointly owned or operated by one or more persons during any base-forming period;

(c) Producers of certified milk or guaranteed raw milk who qualify under Section 104 shall have the option to be included in the Plan at the time of the adoption of the initial Pooling Plan, provided they so state in an application to the secretary submitted no later than the effective date of the Plan. Admission to the Pooling Plan at a later date by such producers shall be on the basis of the production base and pool quota computed according to the same procedure provided under Section 602, for producer-handlers;

(d) Any person who purchased or otherwise acquired a producer's business or a portion of a producer's

business after June 30, 1966, and prior to the effective date of this Pooling Plan, shall succeed to the same proportion of the producer's production base and pool quota, provided that the same rules concerning eligibility for and computation of base and quota amounts shall apply to the business so transferred as though no change in ownership had occurred. For purposes of this paragraph, the term " business " shall be deemed to be the dairy herd and other physical facilities which made up the business transferred, or all or any portion of a market milk supply contract or allotment which was purchased or otherwise acquired under conditions of continuing performance. The transaction by which the business was acquired shall be fully disclosed and documented on forms provided by and filed with the secretary. Any misrepresentation of facts or falsity in statements by either party shall constitute cause for forfeiture of all or any portion of the production base and pool quota under consideration as purchased or acquired. Any disagreement of the producer with the computation of a base and quota which involves this paragraph shall be referred to the Producer Review Board.

Article 3. Adjustment of Production Base and Pool Quota

Section 300. After August 31 of each year, and prior to January 1 of the following year, the secretary shall determine the actual new daily Class 1 and Class 2 usage of solids not fat for the pool area, if any, as follows:

(a) The Class 1 and Class 2 usage of solids not fat for the most recent September through August 12-month period shall be measured against the Class 1 and Class 2 usage of solids not fat for the previous highest identical 12-month period since the 1988-1989 measurement period;

(b) The Class 1 and Class 2 usage of solids not fat for each 12-month period shall take into consideration the total Class 1 and Class 2 usage generated by the pool, plus that amount which is exempted from pool accountability by producer-handlers operating with an exemption under the provisions of Article 6 or Article 6.5, and further adjusted by the amount of certified raw milk used for Class 1 and Class 2 purposes;

(c) If new Class 1 and Class 2 usage of solids not fat is to be assigned pursuant to this article, a ratio of 1 pound of fat to 2.5 pounds of solids not fat shall be used to determine the new Class 1 and Class 2 usage of fat.

Section 301. The total new Class 1 and Class 2 usage computed in accordance with Section 300, shall be allocated to producers as pool quota as follows:

(a) Forty percent of the new quota shall be available for allocation in accordance with the following provisions:

(1) A factor shall be computed based on the production base and pool quota in effect on December 1 for those producers who have not reached the equalization point, using one of the following methods:

(i) For those producers who meet the one-year production requirement pursuant to Section 352, and who received an initial allocation of quota and production base after December 20, 1976 under the provisions of Article 3.5, a factor equal to 75 percent of currently held production base increased by unissued qualifying period production plus the difference between the currently held production base increased by unissued

qualifying period production and pool quota; or

(ii) For all other qualifying producers, a factor equal to 75 percent of the production base plus the difference between the production base and pool quota.

(2) Divide the factor obtained for each producer under Subparagraph 301(a)(1), by the total of the factors obtained for all producers under that Subparagraph;

(3) The result obtained from the computation under Subparagraph 301(a)(2) shall determine the percentage of new pool quota which is available for allocation to each producer. This amount as adjusted by Subparagraph 301(a)(4) shall be assigned to each producer, except that no allocation shall be made to any producer which will result in a pool quota exceeding the equalization point;

(4) If, after these computations, the pool quota of the milk fat or solids not fat component of any producer is less than the equalization point of such producer by no more than 3.5 or 8.5 pounds, respectively, both components shall be increased to the equalization point;

(5) The secretary shall not be obligated to reduce the new quota available for allocation computed pursuant to Paragraph 301(a) by the additional quota assigned pursuant to Subparagraph 301(a)(4), but shall reallocate one time only the residual quota occurring because of a producer reaching equalization by the operation of Subparagraph 301(a)(3);

(6) Any new pool quota remaining to be assigned after all participating pool quotas have reached the equalization point shall be added to that available under Paragraph 301(b) for assignment.

(b) Forty percent of the new quota, increased by that made available under Subparagraph 301(a)(6) shall be allocated to producers whose total production base and pool quota are equal to or above the equalization point. Each such producer's allocation shall be in the same ratio as that producer's total holdings of quota bears to the total quota holdings of all such producers.

(c) There shall be no forfeiture of any pool quota, including that assigned pursuant to this article, except as provided under Article 5.

Section 302. Producers who qualify under Article 3.5 for participation in new pool quota pursuant to Paragraph 301(a) shall receive additional production base at the lesser of 111 percent of the additional pool quota allocated or their unissued qualifying period production. Producers reaching equalization under this provision will receive additional production base equaling unissued qualifying period production. A producer who qualifies under Article 3.5, will be considered to have reached equalization when quota is equal to or greater than 95 percent of the sum of currently held production base and unissued qualifying period production.

Article 3.5. Allocation of New Producer's

Production Base and Pool Quota

Section 350. Twenty percent of total new Class 1 and Class 2 usage computed in accordance with Section 300 shall be available for initial quota allocations to new producers as defined in Article 4.5. Such allocations shall be made available as of February 1 of each year to new producers who

qualify under Article 4.5. This amount shall be added to any previous amount made available pursuant to this section and not allocated. In addition, any quota which has reverted to the pool, under the provisions of Article 5 shall be allocated on a continuing basis to qualifying new producers. This quota will be accumulated until such time as there is sufficient quota to issue to the next new producer on the priority list under the provisions of Sections 351 and 453. Such quota shall be made available for allocation within 90 days after the quota has reverted to the pool.

Section 351. The new producer's initial allocation shall be:

(a) Pool quota at the lesser of:

(1) 95 percent of the qualifying period production as defined in Section 127, or

(2) An amount determined by multiplying a factor times 150 pounds of fat and 375 pounds of solids not fat. The factor to be used shall be the larger of:

(i) 40 percent;

(ii) The lowest factor obtained by dividing the pool quota solids not fat of each producer who receives an allocation pursuant to Article 3 by that producer's production base of solids not fat.

(b) Production base at the lesser of:

(1) The qualifying period production as defined in Section 127, or

(2) 111 percent of the pool quota allocated.

Section 352. Producers who received an initial allocation under Section 351 shall participate in future allocations under Sections 301 and 302 after a one-year minimum period of continuous production following initial allocation.

Section 353. Any pool quota received pursuant to Sections 351 and 352 shall be subject to the provisions of Article 5.

Section 354. No allocation shall be made to any producer which will result in a pool quota exceeding the equalization point.

Article 4.5. New Producer Entry

Section 450. A new producer, as defined under Section 120, and who qualifies under this article, may make application to the secretary on forms provided to establish eligibility for an allocation of quota. Quota, if available, will be allocated within 90 days following the receipt of the application.

Section 451. To qualify for allocation of new quota, a new producer must:

(a) Obtain a market milk permit from the appropriate California regulatory or health authority prior to making application, and

(b) Have a market milk contract and be shipping to a pool handler prior to making application, and

(c) Have one year of continuous commercial production within the State of California prior to making application, and maintain continuous market milk production until receiving an allocation of new quota, and

(d) Satisfy the requirement that at least 50 percent of the interest in the dairy operation is owned by individuals directly engaged in the management and operation of the dairy, and

(e) Operate a production facility that is completely separate and apart from any other production facility

classification of market milk and skim milk (excluding condensed skim milk and market cream);

(b) The computed value of the original and revised classifications at both the shipping and receiving handler market area prices;

(c) The net adjustment to the pool obligation of both the shipping and receiving handler.

Section 814. The secretary shall verify and correct, if necessary, the adjustments requested under this article and adjust the handler obligation accounts within 60 days after receiving the handler report. The handler adjustments shall be reflected in the fat and solids not fat prices by adjustment of the net pool balance utilized pursuant to Paragraph 902(c) or Section 906, whichever is applicable.

Article 9. Computation of Handler Obligation and Quota, Base, and Overbase Pool Prices

Section 900. The gross pool obligation of each handler for each of the plants or for a cooperative association acting as a handler under Paragraph 105(c) shall be computed as follows:

(a) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each plant by the appropriate price announced for such class by the secretary, f.o.b. such handler's plant or the pool or nonpool plant to which diverted;

(b) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each cooperative association acting as a handler under Paragraph 105(c) by the appropriate price announced for such class by the secretary, f.o.b. the pool or nonpool plant where the milk was first received from producers;

(c) Deduct an amount computed by multiplying the pounds of solids not fat or the skim milk equivalent of condensed skim milk used in fortifying Class 1 products by the appropriate charge allowable for condensing or drying of market skim pursuant to the applicable Stabilization and Marketing Plan.

(d) Deduct from the amounts calculated above, a credit to the handler's obligation for milk received from other sources not included in receipts deducted in Section 802 which shall be determined as follows:

(1) The value based on the receiving plant's inplant usage as defined in Section 130 or the value based on the current month's quota fat price for the milk fat component and the current month's quota solids not fat price plus the pool price modification rate for the value of the solids not fat component, whichever is less.

(2) The value based on subparagraph (d)(1) of this Section or the value based on the current month's overbase fat price for the milk fat component and the current month' s overbase solids not fat price plus the pool price modification rate for the value of the solids not fat component, whichever is greater.

Section 901. The total pounds of milk in each class and the pool value thereof shall be computed by the secretary as follows:

(a) (1) Determine the net total pounds of Class 1 milk remaining under Paragraph 803(m) for all handlers and combine into one total sum the obligations of all handlers for such Class 1 milk;

(2) Subtract the net sum of all adjustments computed pursuant to Paragraphs 900(c) which represent

modifications in the actual obligation of all handlers for Class 1 milk.

(b) Make similar determinations of the net total pounds and value of each of the other classes of utilization for all handlers;

(c) For those months in which the secretary has implemented the collection of security charges provided for in Chapter 2.5, Part 3, Division 21 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and 901(b) by:

(1) Multiplying the total pounds in each class by the rate established in Section 62561 of the Food and Agricultural Code; and

(2) Deducting from the total value of each appropriate class, the amounts calculated under Subparagraph (1). The resulting value for each class shall be utilized in computing the prices under Sections 902, 903 and 904 or 906.

Section 901.5 For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and (b) by:

(a) Multiplying the total pounds in each class by the temporary price increase for such class as set forth in Section 300.0 of the Stabilization and Marketing Plans. The funds generated shall form a subpool to be distributed equally to all milk production in the pool;

(b) Deducting from the total value of each appropriate class, the amounts calculated under Paragraph (a), hereof. The resulting value for each class shall be utilized in computing the initial prices under Sections 902, 903 and 904.

Section 902. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the quota price for the fat and solids not fat components of quota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the quota pool and the total value for other source milk by assigning thereto the value or a proportionate share of the total value of the milk fat and solids not fat usages necessary to reflect the total pounds of pool milk which qualified as quota fat and quota solids not fat for all producers, and the total pounds of fat and solids not fat other source milk, excluding the quota fat and quota solids not fat of producer-handlers which was assigned under Paragraph 803(a). The computation of Class 1 solids not fat shall include the value of the fluid component which is contained in the Class 1 skim usage. The values shall be assigned in the following sequence: Class 1, Class 2, Class 3, and then the higher of Class 4a or Class 4b (based on hundredweight value computed at 3.5 percent butterfat and 8.7 percent solids not fat);

(b) Add an amount for each component to the value as necessary to reflect the total amount of regional quota adjusters computed pursuant to Article 9.1;

(c) Add not less than half of the amount on hand in the net pool balance for the respective component of milk;

(d) Subtract from each component the value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-

tenth cent per pound in the price of quota fat and solids not fat;

(e) Divide the resulting sums by the pounds of the components of quota milk plus the pounds of the components of other source milk computed under Paragraph 902(a). The resulting figure shall be the quota pool price for such components.

Section 903. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the base price for the fat and solids not fat components of base milk received from producers during the preceding month, in accordance with the following procedures:

(a) Combine the values computed pursuant to Paragraphs 902(a), and 904(a);

(b) Subtract the total amount obtained under Paragraph (a), hereof, and any security charges calculated under Paragraph 901(c) from the gross pool obligation of all handlers as computed under Section 900(a), (b) and (c);

(c) Divide the remaining value of the milk fat and solids not fat portions of pool milk by the pounds of milk fat and solids not fat, respectively, contained in base milk and round the resulting figure for milk fat and for solids not fat to the nearest one-tenth cent. The prices so computed shall be the base pool prices.

Section 904. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the overbase price for the fat and solids not fat components of overbase milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the overbase pool by assigning thereto the total value or a proportionate share of the total value of the fat and solids not fat components of Class 4a and Class 4b beginning with Class 4a or Class 4b milk, whichever has the lower hundredweight value computed at a 3.5 percent butterfat and 8.7 percent solids not fat basis, as necessary to reflect the total pounds of pool milk which qualified as overbase fat and solids not fat;

(b) Divide the values obtained pursuant to Paragraph (a) of this section by the pounds of fat and solids not fat, respectively, in overbase milk and round the resulting figure for milk fat and for solids not fat to the nearest one-tenth cent. The prices so computed shall be the overbase pool prices.

Section 905. For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, distribute the subpool funds generated pursuant to Paragraph 901.5(a) by:

(a) Dividing the total value of the temporary price increase for each component of milk by the total pounds of that component which was produced and received from producers participating in the pool during the preceding month to determine the value per pound; and

(b) Adding this value per pound adjustment to the initial quota, base and overbase prices computed under Sections 902, 903 and 904. These prices so adjusted shall be the quota, base and overbase pool prices announced for that month by the secretary.

Section 906. This section applies as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute

and announce the prices for the fat and solids not fat components of quota and nonquota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of pool milk by assigning thereto the total values of the milk fat and solids not fat usages, except the fat and solids not fat exemption of producer-handlers which was assigned under Paragraph 803(a). The total value of pool milk shall include the value of usage for other source milk. The computation of Class 1 solids not fat shall include the value of the fluid component which is contained in the Class 1 skim usage;

(b) The total value of the quota premium pool shall be the sum of the following computations:

(1) Multiply the total solids not fat quota pounds by $0.195 and subtract the total amount of regional quota adjusters, computed pursuant to Article 9.1;

(2) Multiply the total solids not fat of other source milk by $0.195.

(c) Adjust the total fat value, calculated in Paragraph 906(a), by:

(1) Subtracting the fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Adding not less than half of the amount on hand in the net pool balance for fat;

(3) Subtracting from the fat value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound.

(d) Divide the adjusted total fat value, as calculated in Paragraph 906(c), by the total quota and nonquota fat pounds plus the total fat pounds of other source milk to determine the quota and nonquota fat prices;

(e) Compute the adjusted solids not fat value from the solids not fat value, calculated in Paragraph 906(a) by:

(1) Subtracting the solids not fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Subtracting the total transportation allowance, calculated pursuant to Article 9.2;

(3) Adding not less than half of the amount on hand in the net pool balance for solids not fat;

(4) Subtracting a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound;

(5) Subtracting the quota premium pool value from the total solids not fat value, calculated pursuant to Paragraph 906(b).

(f) Divide the adjusted solids not fat value as calculated in Paragraph 906 (e), by the total quota and nonquota solids not fat pounds plus the total solids not fat pounds of other source milk, to determine the nonquota solids not fat price;

(g) Add $0.195 per pound to the solids not fat price calculated in Paragraph 906(f) to determine the quota solids not fat price.

Analysis of Pooling Hearing
February 4, 1997

Background

A hearing was held on December 6, 1996 (the original hearing) in response to a petition filed by three co-petitioners: Western United Dairymen, Alliance of Western Milk Producers. and the Milk Producers Council. One alternative proposal was submitted by co-petitioners Rockview Dairies, Inc, Security Milk Producers, and Advanced Milk Commodities in response to the petition. At the hearing, another concept was submitted by California Gold Dairy Products.

As a result of the first hearing, a second hearing was held on February 4, 1997. The entire hearing record of the first hearing was incorporated into the second hearing. The original petition was slightly modified for the second hearing. In addition to the original petition and the Rockview alternative proposal, two additional alternative proposals were received: one from California Gold Dairy Products, Inc. and one from Kuhn Farms. Consequently, a total of four proposals were formally incorporated into the hearing record and are summarized below.

Proposals

1. Western United Dairymen, Alliance of Western Milk Producers, and Milk Producers Council:

a) Differentiates between "Qualifying Out-of-State Milk" and "Non-Qualifying Out-of-State Milk" and establishes different pool handler credits for each.

• qualifying out-of-state milk would receive the lower of plant blend or quota

• non-qualifying out-of-state milk would receive the overbase price

b) Provides for the concept of "netting" of export/import milk in relationship to "facilities" that share "ownership, affiliation or control"

c) Provides for technical amendments to the Pool Plan

• to be consistent with provisions of SB 1885 which became effective 1/1/97

• simplifies the definitions of market milk, manufacturing milk, and degrade milk (Restricted Use Market Milk).

• adds provision for interpretive and explanatory authority for the pool manager

d) Provides for Severability for Pool Plan.

2. Rockview Dairies, Inc., Security Milk Producers, Advanced Milk Commodities:

a) Expands the producer-handler exemption under article 6.5 to include milk brought in from out-of-state ranches owned by the producer-handler.

b) Removes prohibition against non-exempt producer-handlers from obtaining pool exemptions.

c) Provides a pool credit for transportarion credits on plant-to-plant shipments that originate outside California. (Transportation credits themselves were the subject of the Stabilization and Marketing Plan hearings held on Febnary 5 and 7, 1997)

c) provides transportation allowances for milk shipped into California directly from out-of-state ranches.

e) provides technical adjustments regarding producer-handler exemptions, updating pool plan to be in conformity with governing statutes (i.e., section 803(a)).

3. California Gold Dairy Products. Inc

a) Adopts the concept of "qualifying out-of-state milk" and "non-qualifying out-of-state milk" of the three co-petitioners. However, qualifying out-of-state milk would receive the plant blend credit, as currently provided for in the Pooling Plan. Non-qualifying out-of-state milk would be known as "comeback milk" and would be allocated on the same basis as the California milk which it replaces would have been allocated.

b) With regard to milk meeting the definition of "qualifying out-of-state milk", adopts the concept of "facility control" and affiliation but also adds a 48 hour time constraint (i.e. any milk exchanged within the 48 hour window would be "nonqualifying out-of-state milk"; any milk exchanged after 48 the hour window would be qualifying).

4. Kuhn Farm.

Provides transportation allowances for ranch milk that is shipped from Imperial County to the Southern California receiving area (currently, there is no allowance from this area).

Positions of Hearing Participants

Refer to Attachment I at the end of this document.

Public Policy Basis for the Recommendations

Public Policy Interests

The pooling and pricing statutes were enacted to help safeguard, protect, and promote the following public interests:

1) the health and welfare of California's inhabitants,
2) prevent the undermining of sanitary, purity, and food safety safeguards caused by economic, and destructive marketing practices,
3) an adequate continuous supply of milk and dairy products.
4) stabilize and prevent economic disruptions and chronic instability in milk marketing as characterized by volatile periods of surplus production and low prices, and periods of supply shortages and high prices,
5) assure intelligent production and orderly marketing, or conversely to eliminate econonic waste, destructive trade and marketing practices,
6) assure proper accounting for market milk purchases.

Panel Recommendations - Framework for Hearing Recommendations & The recommendations' impact on hearing participants

Each of the hearing participants testified in support or opposition to variety of issues depending on their economic interests. They can be generally outlined as follows:

Dairy farmers as represented by the petitioners (Western United Dairymen, Alliance of Western Milk Producers, and Milk Producers Council):

Proposed changes in the pooling plan which would modify and reduce the current economic incentives that attract milk outside California to serve California's fluid milk needs.

They have indicated in their testimony that in part their objective is that the California Class I milk needs should be supplied from California dairies. They cite inequities in the treatment of out-of-state producers versus the California producers from the present pooling system (i.e., out-of-state producers are accorded a better treatment from a higher pool credit than California producers based on a regulatory burden, not one created from a competitive advantage). In addition, such favorable pool accounting treatment relative to out-of-state milk actually encourages the circumvention of the pool, causing revenues that would be shared by all pool participants to be redirected to a select few.

Directly Impacted Opponents as represented by Rockview Dairies, Security Milk Producers, Advance Dairy Products, California Gold Inc. whose operations would be adversely affected by the proposed changes in the existing pooling program. They currently are involved in bringing milk supplies into California from sources outside the state. They have argued that the proposed changes violate the interstate commerce provisions of the US Constitution.

Dairy Processors as represented by Dairy Institute who believe that California milk prices at the farm level should be reduced rather than invoking the proposed changes to the Pooling Plan. They are opposed to removing their option to obtain milk supplies from out-of state sources. They also have raised legal questions regarding the interstate commerce issues and are concerned about the enforcement of minimum payment statutes relative to the procurement of out-of-state milk.

Pro and Con

Proposal 1: Western United Dairymen, Alliance of Western Milk Producers, and Milk Producers Council

1a. "Qualifying" and "Non-Qualifying" Out-of-State Milk

Pro:

• Re-establishes an equitable price relationship between milk produced in-state and milk produced out-of-state. Originally, the quota and the Class I price were substantially the same. However, over a period of time, regulatory changes were made which distorted the quota to Class I price relationship. Changes have also occurred over the past fifteen years in the industry dynamics.

• Prevents circumvention of the pool by California-based entities that convert their overbase milk to Class 1 milk.

• Increases pool revenue by changing the pool credits from plant blend to quota; prevents the redirection of pool revenue (that would otherwise be shared by all) to select few.

Con:

• Formally identifying milk as "out-of-state milk", "qualifying out-of-state milk" and "non-qualifying out-of-state milk" increases an interstate commerce challenge.

• By changing the existing credit of plant blend to one of lower of plant blend or quota, California processors have less economic ability to attract additional sources of milk.

• By changing the existing handler credit of plant blend to a credit of the lower of plant blend or quota (without a floor), out-of-state milk could receive a pool credit even lower than comparable in-state milk, potentially discriminating against the -out-of state producer (petitioners did state in their post hearing brief that could accept a floor at overbase). This increases exposure via an interstate commerce challenge.

Recommendation;

The petitioner's proposals regarding pool handle credits should not be adopted as proposed: It is the recommendation of the panel that the petitioner's terms such as "outof-state milk" "out-of-state handler" "qualifying out-of-state milk" and "non-qualifying out-of-state milk" should not be adopted, based on the legal analysis received from our counsel. Using such terms in differentiating out-of-state milk from California milk could increase legal exposure via an interstate commerce challenge. The term "other source milk" should be used to describe all milk not defined in the Pool Plan. We recommend that "other source milk" be credited at plant blend, not to exceed the quota price and not to be less than the overbase price; in computing such amounts, the cost of administering the transportation allowance/credit system should not be included (i.e., per the petitioner's "pro-forma" quota price in their modified proposal).

Adopting the petitioner's proposal of the lower of plant blend or quota (without a "floor" provision) could result in a pool credit for other source milk lower than corresponding credit for milk defined in the plan. This argument was advanced by California Gold resulting in discriminatory treatment of other source milk; in such situations, other source milk could receive less than the overbase price.

1b. "Netting" Export/Import Milk and Facility "Ownership, Affiliation or Control".

Pro:

• Better defines existing pool policy for "turnaround milk". It strengthens the existing pool policy regarding commingling of milk which is subject to legal challenge.

• To prevent "turnaround milk" -converting overbase milk to a higher value (plant blend) thereby circumventing the pool. Prevents the redirection of pool dollars that would be shared by all California producers to a select few.

Con:

• The concept of "ownership affiliation or control" would be difficult to both define and administer. The pool administrator would continually have to monitor a very dynamic milk movement industry, potentially examining each and every transaction for "arms-lenths" appropriateness.

Since the concepts of qualifying and non-qualifying milk are not recommended, the entire concept of netting and facility ownership/control become a moot point. We therefore recommend that this proposal not be adopted.

It should be noted that the concept of netting would be a more equitable alternative if the original proposal was adopted; however, the reality of administering such a concept on a day-to-day basis would require tremendous staff resources, making the proposal administratively unenforceable.

1c. Technical Amendments

Pro:

• Brings the existing pooling plan into conformity with current governing statute.

• Clarifies and simplifies certain fundamental definitions with regard to pooling terminology.

Con:

• Some proposed wording of certain technical changes by the Petitioner is not consistent with SB 1885 (i.e., "degrade milk" vs. "restricted use market milk")

Recommendation:

The panel recommends adopting the proposed technical changes with sonic modification to terminology ensuring conformity with governing statutes.

1d. Severability of Pool Plan Provisions

Pro:

• Allows for the overall plan to remain in effect even if a portion of the plan is found to be invalid for any reason.

• Without such a severability provision, whenever the pool plan goes to a producer referendum for a vote on a specific provision of the plan or a specific provision is under court review, the entire pool plan could be at risk.

Con:

• May be harder to obtain a favorable vote on a specific provision change with severability in place, since the entire plan is not at risk

Recommendation;

The panel recommends adopting the proposal as presented.

Proposal 2: Rockview Dairies, Inc., Security Milk Producers, Advanced Milk Commodities

2a. Expanding the Producer-Handler Exemption Option

Pro:

• Maintains and enhances Roekview Dairy's standing with regard to their out-of-state milk. Lessens the economic loss to Rockview if the Petitioners' proposals are adopted.

• Allows other existing exempt producer-handlers (i.e., under section 653) to establish out-of-state ranches and exempt milk from the pool thereby increasing their competitive advantage in the state.

Cons:

• Gives further preferential regulatory advantage to exempt producer-handlers thereby giving them additional competitive standing relative to non-exempt handlers.

• proposal expands the exemption in pool plan which would require a statutory change, not pool plan change; reference section 62078.5(e) which specifically grants such authority.

Recommendation:

The panel recommends that this proposal not be adopted. Modifying the pool plan by incorporating such proposed changes would be in conflict with governing statute, subjecting the pool plan to legal challenges.

2b. Expands Producer-Handler Exemption Option

Pro:

• It allows any quota-holding producer to expand (i.e., to build a plant and therefore expand fluid milk processing capabilities in the State of California).

Con:

• Allows for an expansion of the producer-handler exemption under article 6.5, which further increases the economic advantage that producer-handlers enjoy over competing proprietary handlers (i.e., could create more competitive disruption in the marketing of fluid milk based on regulatory provisions).

• The proposal attempts to remove the election date from the pool plan; this election date is also found in statute (code Section 62708.5(4)), which states that such election must be made by August 5, 1969.

Recommendation:

The panel recommends that this proposal not be adopted. Modifying the pool plan by incorporating such proposed changes would be in conflict with governing statute, subjecting the pool plan to legal challenges.

2c. Pool Credits for Transportation Credits for Plant-to-Plant Shipments that Originate Outside California.

Pro:

• We will not analyze this proposal as it is outside the parameters of the Pool Plan.

Con:

• We will not analyze this proposal as it is outside the parameters of the Pool Plan..

Recommendation:

Transportation credits are a subject of the February 5 & 7, 1997 Milk Stabilization and Marketing Plan hearings'; therefore, the issue of pool credits for transportation credits will depend on whether or not the Department adopts transportation credits for other source milk.

2d. Transportation Allowances for Milk Shipped from Out-of-State Ranches

Pro:

• Equitable treatment for milk moved from a surplus area to a deficit area. Nevada is a surplus ara therefore should be afforded equitable treatment.

• Lessens interstate commerce challenge; by extending transportation allowance to out-of-state milk, issue of preferential treatment for in-state produced milk is eliminated.

• Restores some incentive for out-of-state milk to move into the state if recommendation in proposal 1a is adopted.

Con:

• Transportation allowances replace the market signals lost when individual plants blends were replaced by statewide pool; however, other source milk still receives a market signal at the plan; blend price.

• Outside of the pool plan's regulatory boundary to provide pool subsidies to out-of-state producers.

• Administratively difficult; allowance would have to be processed through the California handier and be passed to the out-of-state producer. Therefore, this would require reviewing minimum payments to out-of-state producers to

ensure that the out-of-state producer actually received the entitled allowance. Review/enforcement of minimum payments to out-of-state producers could be subject to legal challenge.

• Expanding transportation allowances to out-of-sate producers could require significant modification to the instate plan, based on an equity argument, which could distort the existing milk movement program.

Recommendation:

Panel recommends that the proposal not be adopted. Before expanding the existing transportation allowance/credit system, the entire program should be reviewed. However. other source milk should be credited at quota plus cost of transportation.

2e. Technical Adjustments Regarding Producer-Handler Exemptions

Pro:

• Brings the plan into conformity with governing statute

Con:

• none

Recommendation:

The panel recommends that the proposal be adopted as presented

Proposal 3: California Gold Dairy Products, Inc.

3a. "Qualifying." and "Non-Qualifying" Out-of-State Milk

Pro:

• "Qualifying out-of-state milk" continues to be credited at the pool blend price.

• To identify "comeback" milk (i.e., overbase milk that originated in California and was exchanged with out-of-state milk under an affiliated arrangement to extract a higher pool credit) and eliminate circumvention of the pool.

• By maintaining the existing credit of plant blend, California processors have economic ability to attract additional sources of milk.

Con:

• Formally identifying milk as "out-of-state milk", "qualifying out-of-state milk" and "non-qualifying out-of-state milk" increases an interstate commerce challenge.

• By continuing the existing handler credit of plant blend, other source milk would maintain the regulatory advantage.

• With the plant blend price, would encourage circumvention of the pool plan.

• By changing the existing credit of plant blend to one of lower of plant blend or quota, processors have less economic ability to attract additional sources of milk.

Recommendation:

The panel recommends that the proposal not be adopted. The panel has recommended that the concepts of "qualifying" and "non-qualifying" out-of-state milk be abandoned and other source milk be issued a pool credit of the plant blend, not to

exceed quota or be less than the overbase price; consequently, there would be no need to identify milk using this terminology.

3b. "Facility" Control and Affiliation with 48 Hour Time Constraint

Pro:

• Prevent pool circumvention by California entities which convert overbase milk to a higher pool credit, thereby extracting revenues that would otherwise be shared by all California producers.

Con:

• Very difficult to administer and enforce. Must first identity all milk procurement arrangements and determine if such arrangements are either controller or affiliated. Then, must apply 48 hour time constraint.

Recommendation:

The panel recommends that this proposal not be adopted.

Proposal 4: Kuhn Farms, Transportation Allowance for Imperial County

Pro:

• Would allow Kuhn Farms to be more competitive in shipping milk into fluid milk plants in the Los Angeles area.

Con:

• This issue was dealt with in the transportation allowance/credit hearing held in October 1996 where

extensive economic analysts indicated that such an expansion of the allowance system to Imperial County was not warranted at this time.

Recommendation

The panel recommends that this proposal not be adopted. It is recommended that the Department sponsor a series of meetings to study incentives to attract milk to its highest and best uses: this could include new concepts as well as a review of the current system (transportation allowances, transportarion credits, call provisions).

This panel report is based on the testimony and evidence presented at the public hearings held on December 6, 1996 in Sacramento and February 4, 1997 in Ontario, California, and included in post hearings briefs filed by December 16, 1996 and Februazy 14, 1997.

All testimony and items of evidence submitted by all parties to these proceedings, whether specifically mentioned herein, have been considered in rendering this panel report. All provisions set forth in Chapters 2 and 3, Part 3, Division 21 of the Food and Agricultural Code, whether specifically mentioned herein, have been considered in rendering this panel report.

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